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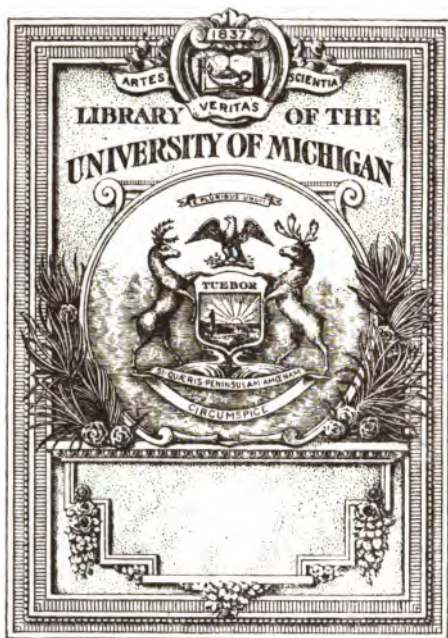
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CIVILIZED COMMERCIALISM



CIVILIZED COMMERCIALISM

BY
ERNEST G. STEVENS



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PREFACE

THE plan presented by this book is an application of democracy to business. If democracy is to go on making America, democratic principles cannot remain merely in politics. They must go into business. Democratic principles must drive business privilege out of our business system or business privilege will drive democratic principles out of our political system.

Democracy is in the making in America and still has most of America to make. The hardest battles are ahead. Across democracy's march toward full freedom and fraternity business is a Chinese Wall of contradiction. It is bastioned by favor and oppression and defended by the fearsome Giant Despair. Yet the high spirit with which the hosts of democracy started demands more than the scaling of that wall. The frowning top must be turned into a beautiful boulevard of progress. Democracy applied to business can make this wall more useful to each as an avenue on which to advance than it ever was to some as a barrier to others. The plan of *Civilized Commercialism* is presented in the hope

PREFACE

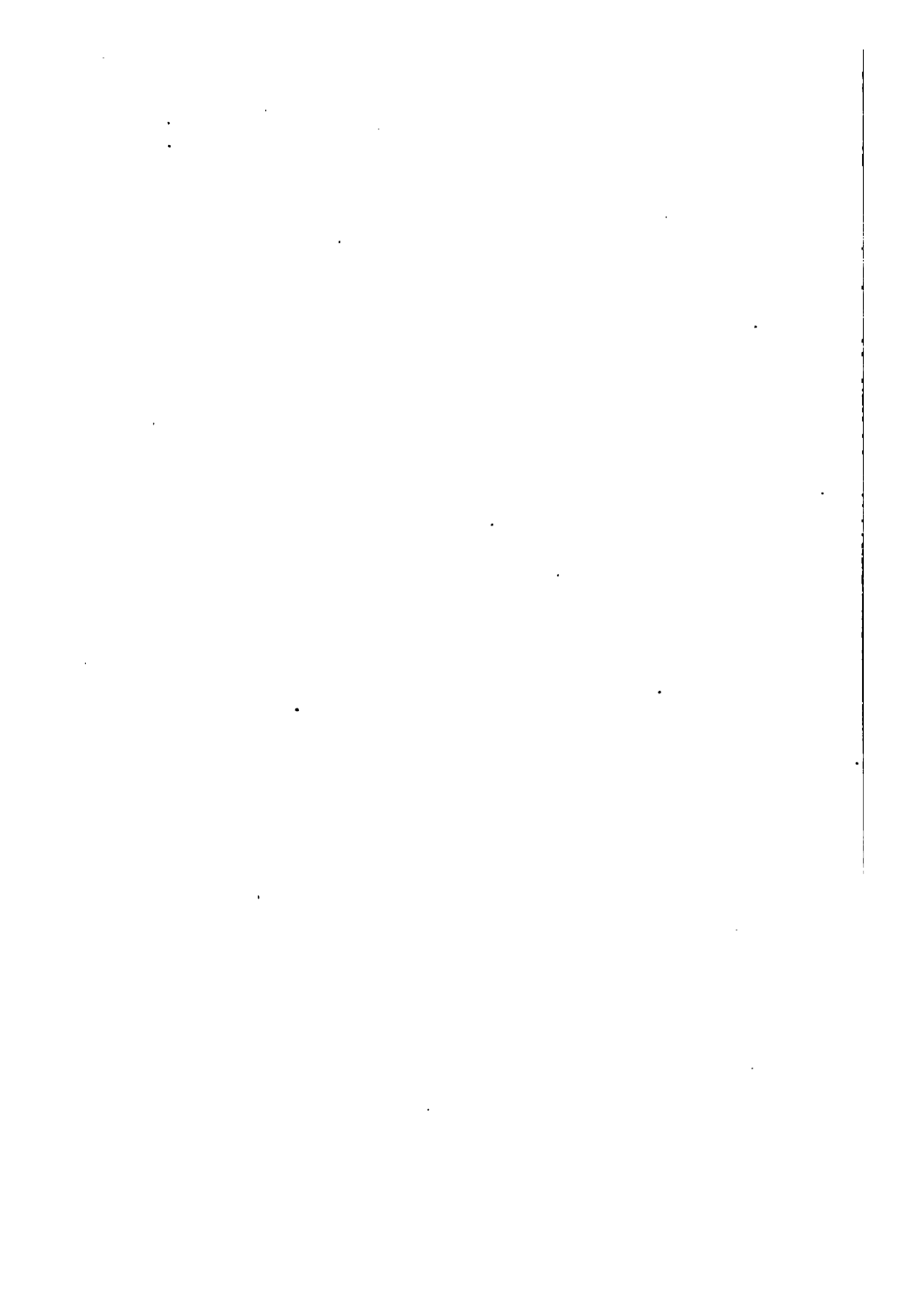
that it will aid the marchers for the greatest cause in the world—the cause of the common good.

Since the author first published the germ of this book in the form of an article in the *American Law Review* (June, 1914), he has had the benefit of much discussion with many friends and correspondents in all parts of the United States. To each of his esteemed collaborators he offers his cordial thanks.

ERNEST G. STEVENS.

New York City,
February 21, 1917.

CIVILIZED COMMERCIALISM



CIVILIZED COMMERCIALISM

CHAPTER I

MONOPOLY AND PAST CIVILIZATIONS

FULLY to realize the dangerous tendencies of our present trusts it is necessary to visualize the results of similar conditions, in principle, in the past. In the civilizations of the past where production has been monopolized, as it is tending to be in ours, prosperity has been merely, as with monopoly it will be with us, the advance agent of destruction. One of the last works of Professor John Pentland Mahaffy of Trinity College, Dublin, the world authority upon ancient Greece, is *What Have the Greeks Done for Modern Civilization?* Aristotle, Professor Mahaffy recalls, in describing his ideal as "a small, well-ordered state, governed in the interest of the majority of the citizens by good laws and humane rules, makes it his *sine qua non* that the middle class shall outweigh in public importance both the wealthy and the indigent."

The learned author continues: "Now that was

exactly the condition which in the days of Polybius was becoming rarer and rarer, nay, practically unknown. This was the very class disappearing rapidly from every state in Greece. And why? The economic conditions were changing, and owing to the great influx of gold from the East and other causes, living was becoming dearer every day. Luxuries were also coming to be regarded as necessities, and so for the poor who had the bribe of large pay and great license offered them in the mercenary service of Hellenistic kings, emigration became the rule, and the want of labor turned farming from the agricultural to the pastoral type. Hence the middle classes, which had no capital to work large farms, became poorer and the rich richer and more selfish'' (p. 206).

Monopoly in Greece took the form of landowning. A few great landowners gradually acquired about all the desirable acres. It is not necessary to assume they acquired them unfairly. However they acquired them, what the landowners wished to produce was then produced, not what should have been produced. They had no realization that they were mis-producing. Of the kinds of food produced there was too much to be productively consumed. Still less was there an opportunity for each individual to procure from a varied basic fund that commodity which he could consume most productively and profitably.

Monopoly, though unsuspected, was the cause of

the lessening of population and of the emigration of the young men to serve as foreign mercenaries. There was no employment for the young men in Greece because the basic fund of commercial intercourse was mostly cattle and, for productive purposes, mainly economic corpse. No one had anything else of much account to exchange for cattle and only a few had many cattle. Those who owned them had plenty of beef to eat but had to exchange many of them to get anything else. Other people had little of anything to exchange. Little was left in the country but meat. Consequently while meat was high, expressed in terms of money, it was not as high as other commodities. Meat was high because the effective demand for money was slight. People who had by labor to earn money to buy meat found it extremely difficult to make a living, notwithstanding that Greece was full of cattle. Monopoly had reared its grisly head because the large landowners had gone on raising what they began to raise, instead of what people could productively and profitably consume. Emigration, race suicide and the cost of living were rapidly increasing but none knew why, or that the first two were alternative effects of the third,—the cause of which was before their eyes. No one pointed out any economic defect in the cattle policy.

The large landowners acquired the land from a natural desire after they had in some way acquired

money. We are dealing only with the conditions after monopoly was established. Obviously the purchase money received by the small landowners had been turned into commodities unproductively consumed. Monopolistic landowning then forbade replenishment of the basic fund. Hard times continued indefinitely as poverty times. The rich got richer but only for a time. They inevitably began to get poorer too when their unequal prosperity dragged down general prosperity faster than they absorbed the little prosperity that was left. For a time only in a free state can a small rich class prosper at the expense of the rest. When the small class owns all there is to own, it can own no more* except through new production. It can itself, unaided, produce little. If its consumption then remains the same, it constantly grows poorer. It will produce no more than it can itself produce unless it uses slaves or serfs. Employees under such conditions are no longer free because they are at the mercy of monopolists. Freemen and equals will have long since disappeared by emigration or race suicide—or descended to be serfs or slaves in a state no longer free. The value of a large middle class, it is thus seen, was not over-estimated by the great intellect of Aristotle.

Statesmen in Greece devoted themselves to dilat-

* Except by foreign trade and if we assume a world-wide state even that is eliminated.

ing on the advantages of country life and wondered why the young men would not, though it was perfectly evident they could not, longer live there. The young men reasoned just as little. Both cattle owners and mercenaries were acting under the spur of conditions as they found them. No one effectively tried to change them because no one knew the cause of the conditions. Piety wrongly ascribed them to the gods. The young men left Greece because conditions had become so bad that a better prospect offered in foreign armies, even after deduction of the large prospect of early death. Only death from starvation—still earlier, more certain and less glorious—remained in Greece. Country life commissions could not have changed it. Only the end of monopoly with myriads of small farmers producing different products for mutual and foreign exchange could have worked regeneration. Only thus could each, at least by exchange, have secured whatever he could most productively consume.

Steam and electricity alone made monopolization possible upon the present enormous scale, as they alone made possible the present production of manufactured commodities. In earlier times monopoly was wont to root itself in the land where, firmly fixed in private property, it defied correction and obstinately awaited ruin or revolution. In earlier ages a foreign foe usually invaded and conquered before the weakening process had gone so far as to

produce a revolution such as France, in a softer time, was enabled to await in 1789.

This learned Greek scholar, Professor Mahaffy, has not failed to note in ancient Greece monopoly's usual phenomenon: Race suicide. Race suicide does not come from antipathy to children, but in general from antipathy to growing poorer through raising them. We say growing poorer advisedly. This is not the same as growing poor. Many practise race suicide who could not be made poor by the largest families. Many do not practise it who are already poor and who, by their large families, are kept poor but not made poorer. Race suicide, among a free people of modern ideas, rests upon the same human pride and high ambition which have encompassed the highest ends. Far from antipathy to children, it is often but the strongest expression of self-denial of offspring much desired. Hating poverty, many refuse to raise children to be poorer than themselves; or to raise them poorly to live, as they view it, despised. As pride and ambition have often foregone honor and life itself, it is not surprising that these motives should be strong enough to forego that part of life which lies in producing and beholding offspring.

Just as freemen of spirit will not willingly become slaves, so they will not, without protest, suffer a lesser inequality to creep between them and their former equals. Race suicide in Greece was but that

protest translated into action in the only way then open except emigration. A change of system was not open because, while monopolization of land was considered proper, it was impossible. Race suicide is operating with us now and it is impossible for it not to continue to operate in present conditions while barbaric commercialism (i. e., our present commercialism of inequality of opportunity, of favor for the strong and scorn for the weak) is recognized as proper and legitimate. Easy the descent to Avernus, but harder to bear than all the tortures there, is it to descend from former splendor. That descent is not so easy. Foregoing children in order to remain is a price eagerly paid by most, though by some not admitted even to themselves. It is idle for any not among the poorest to say he cannot support a wife and family. Poorer men than he are doing it.

What he means is that he cannot do so without descending in the social scale, i. e., without living in a different manner from that in which he lives as a bachelor. The same logic applies to childless married couples. Except the poorest, they could support children by altering their scale of living. It is that which is for them harder than Avernus. It is not luxuries they crave but the position in life such signify. Often they secretly deprive themselves of as many luxuries as will not outwardly betray them. Those outwardly enjoyed by all, generally speaking, in a certain class cannot all be given

up by those who would remain. To go down in the scale implies inefficiency. It argues failure. It means that their friends and former associates will know they have lost out. Loss of associates means loss of opportunity. Failure known only to one's self is hard to bear. It is impossible for most natures, except through dire necessity, to publish it to the world. Rather than do so, a few every day commit suicide. In order not to do so, most will any day commit race suicide. Pride refuses to confess defeat. Ambition hopes for final victory. Loss of creature comforts cuts some figure, but that sacrifice would be easily borne except for pride and ambition.

It is only upon the higher scale that its luxuries are necessities. What hurts is to leave the scale, not the comforts. Greater sacrifices than creature comforts are daily made for honor's sake, in wars and explorations, when pride and ambition point the way.

This economic process of race suicide is entirely in accord with, not opposed to, Malthusianism. Malthus pointed out in 1800, and his doctrine has been accepted, that a people who do not impose voluntary checks on the natural increase of population will, when increase of population presses them to a lower level of subsistence than necessary to maintain their powers, have their numbers reduced by the "positive checks" of disease, famine, war and pestilence. This doctrine recognizes that a civilized people of European ideas will interpose voluntary checks; that

they will be interposed the more readily and effectually in proportion to a people's advance in civilization; and that desire of luxuries and decencies has greater power to overcome the disposition to excessive procreation than fear of want. It is also well recognized by economists that voluntary checks are least exerted by the poorest class. To this class children are rather an asset than a liability. These checks are most exerted by the middle classes because their motive is greatest. A nation only uses voluntary checks as some of its people use them, for a nation only commits race suicide through individuals committing it.

Yet the chief object of each class exerting a voluntary check, including the poorest, is to avoid falling below the standard which it has established for itself as the lowest possible. With the poorest this is closer to the lowest physically possible. Just as the poorest class chiefly exert the voluntary check, when they exert it at all, at the starvation line for them, i. e., their line of subsistence as they have been subsisting, so each class above exerts it at its own line of subsistence and that is the line, in monopolistic conditions, which denotes the scale of the class above them to which they aspire. Those just a little poorer than the richest wish to live exactly like the richest. They cannot do so and have children and consequently they commit race suicide. So it goes down through the gradations in wealth as soon as a

rich class exists at the top which, though small, is large enough to excite envy and emulation. Whenever wealth is more esteemed than service, envy and emulation of the rich increase.

Once the rich class is large enough to set up the standard of the dollar as the earmark of success according to that public sentiment of which it is itself the creator, the process is in full swing. The classes below yield to the sentiment and the standard above. They think they have to do so, and so they do or lose caste from the public viewpoint. A man who can not make money is under par, whatever else he may make—even if it is success by a higher and, it may be well said, a rational standard. He is still below par by the standard of the prevailing public sentiment set by the very rich, their sycophants and copyists, and that is enough to make him, in general, commit race suicide. The standard of a class above—as far above as can be reached by race suicide—becomes his starvation line below which he will not fall so long as he can exert a voluntary check. That is the check our intellectual classes are exerting today in order to live elsewhere than in Poverty Row, as they view Poverty Row.

Aversion to parenthood, or of womankind to motherhood, has little effect except as it is first created by this same corruption of class standards. Such aversion is neither natural nor self-created.

The fact that it never operates widely while prosperity remains fairly equally distributed shows that the trouble of children is not the cause of their elimination. Doubtless a few frivolous, feather-headed women now think they are not having children because they detest the pain of bearing and the trouble of rearing them. These same women—feathery weather-hens as they are—would equally with each other vie in producing, instead of preventing, progeny did the public sentiment of their class veer in that direction. To them the pain and trouble, even of Avernus, are as nothing compared with not being in the fashion. The sentiment against having children, in time, also permeates the richest class at the top. The growing absence of children has made society more frivolous and pleasure-loving. All are subject in some degree to public sentiment—even those who were most its makers. That it is their own Frankenstein does not alter its power over them. Without having to do so and without knowing why, the richest, also, soon cut down children in order to have the better time which other people are having and which the richest are financially, of all people, best able to enjoy.

People already among the poorest lack the spur of false shame which, in a society where wealth is the standard of merit, those feel who are getting poorer. The poorest never struggle so hard to get up as the poorer strain to keep from going down.

While ambition may excite the poorest, the element of injured pride is absent. The extent of the power of this latter element can be measured from the fact that the poorest seldom commit race suicide. They are already down and they know it. They feel no shame in remaining there. They have always been poor, and consequently feel no sense of personal blameworthiness because they are not rich. They would like to get up. They would like to accompany their friends who manage to rise. To that only ambition urges. To rise is success. To stay behind where they have always been is not failure. For them it is keeping up. Consequently, ambition or no ambition, they keep on having children. To those higher in the social scale children mean failure and consequently, with pride added to ambition's urge, they do not have them. To do so would not be keeping up. The poorest are happier with one fear less. Starvation they may dread but they fear not failure.

In a society where, as in ours, money became the standard of success, Professor Mahaffy thus recounts the process of race suicide:*

“And what was the remedy adopted by the middle classes to maintain themselves in comfort? An expedient not unknown in this country and for not very dissimilar reasons. It was the limitation of families, the avoidance of the duty and cost of bring-

* His book consists of lectures delivered in the Peabody course at Boston and by “this country” he refers to the United States.

ing up children, so that Polybius speaks of it as the signal feature of the Greece of his day—the strange barrenness that had come upon the once prolific inhabitants of the land. Such a misfortune can be avoided only when great immigration exists, and even then it results in replacing the old population, the cream of the country, by the scum gathered from abroad. There were no inducements for immigration into Greece, and so the country which was once teeming with population sunk into somnolence and decay.

“Could I offer you a clearer proof of the modern character of this civilization, which had not only a youth and an age of gold, but then a silver autumn or a Martinmas summer, when Plutarch lived in his little deserted town, surrounded by a complete and terrible decadence?” (pp. 206-7). Professor Mahaffy does more than prove Greek civilization modern. He proves modern civilization Greek by showing both to be monopolistic.

The learned author had earlier written: “There is no commoner phrase in the mouth of Greek revolutionists, or in the mouth of those that dreaded them, than ‘Abolition of debts and redivision of the land.’ Aristotle mentions these as the watchword of the mob-leaders” (p. 186). Yet Professor Mahaffy states that there is no record in Greek history of any such successful revolution and redivision.

As to Greece, the latest Roman historian, Ferrero,

in his famous *Greatness and Decline of Rome*, thus adds his testimony to that of Professor Mahaffy: "When Greece was declared a Roman province in 146 B. C. the decadence of the whole country had already begun. Her territorial and maritime empire had gradually fallen away, her commercial supremacy had disappeared, her capital had been exhausted and her industries ruined, art and study were decaying, and the source of her former wealth had run dry" (Vol. V, p. 1).

"Celibacy and debt, the two great scourges of the ancient world, which constantly suffered from want of capital and diminished population even in the most prosperous epochs, had brought desolation even to the countryside" (V, 3).

"Unfortunately the poverty of Greece was not merely the result of circumstance; it was due to many moral vices, public and private; luxury, frivolity, moral degradation, the corruption of justice, a mixture of civic arrogance and civic indifference, the spirit of chicanery, *the domination of a little minority of rich men and the servility of the numerous poor*" (V, 6). The italics are ours.

This author, of historians the most modern and economic, conceives of Roman history, if not all history, as a constant submergence of an aristocracy by a rising democracy—in turn producing its own small aristocracy to be in turn destroyed by its own prosperity. If this be the true philosophy of his-

tory under the present system, certainly it is operated by a sufficient cause. Whatever adds to that cause adds to chaos. Whatever takes away slacks the process and, if done at a time when a substantial middle class still exists, tends longer to preserve, and makes easier more fully to attain, conditions nearer those of the ideal state.

Monopoly's advocates may retort that, notwithstanding the rolling of peoples and civilizations into oblivion, the world has still progressed. It is true that we have advanced in most fields, certainly in the practical and mechanical though not the artistic, beyond the Greeks. We have no means of knowing how much farther than ourselves the Greeks by this time would have advanced in every field, had they not rendered further advance impossible in any by not advancing equally, or at least equally enough to retain a large middle class. If there is anything in training and heredity it would seem that uncounted generations of trained minds should have made greater progress than has been possible by constantly civilizing new races of savages—of whom we are among the latest but under the present system certain not to be the last. If the human material was equal at the start, untold æons have been lost in racial kindergartning. We have no reason to think the Greek beginnings inferior to ours. We have less reason to think our average intelligence yet equal to theirs of that age when, among Athenian citizens,

the lot would have chosen a worthy and competent mayor. That the world has progressed some or much is no proof that, except for constantly recurring domination of little minorities of rich men,—the outworkings of monopoly,—it would not have progressed much more.

Not alone in Greece did monopoly in the ancient world work its dire effects. In turn imperial Rome herself succumbed to the same cause and the proud conqueror of the world was likewise conquered by her own prosperity. In Rome the same process which ruined Greece was repeated. The land was likewise monopolized. The only difference was that for cattle and sheep there were substituted the olive and the vine.

Gradually Italy produced wine and olives more largely till enormous vineyards and olive orchards covered her hillsides. Later when the Roman populace were starving for the corn which had to be brought at all hazards from Egypt or Asia Minor, the fertility of Italy was producing in great abundance the finest and most costly wines. These the people could not buy and did not drink. They could not buy because the land from which they might have produced something to exchange was monopolized. All this had come about very gradually and properly according to the existing system.

No rich man had stolen his land or in violation of the strict Roman law, it may be assumed, ejected

any poor farmer by force. The poor farmer had been glad to sell. He received a good price and went to the city where, after spending his money unproductively, he hoped to get free corn. The little he was likely to get looked more promising than anything he could get at home. The basic fund was mostly economic corpse though wine and olives. The farmer could raise only some of the things he wished to eat. More could probably be obtained in the city for various client services. The farmer's small products had lost most of their exchangeability because few at home had anything to exchange for them except those who had wine and olives. They had raw products enough of their own and wished money, or other luxuries, for wine and olives. Consequently they were high as the effective demand for money was slight.

Effective demand for money was so slight that everything was high,—the only difference among commodities being that some were higher than others. In this situation no one could raise enough raw products to buy anything worth while. Transportation was also high and there was little profit in sending corn to the city. Practically all he obtained from his farm was what he ate himself. Naturally the Roman citizen felt it was more cheerful to eat in the city among his compeers at the expense of the state. Eating was equally the sole benefit in either place and in the city it came with less work

and more society. All this was caused by the monopolization of the source of production, the land. In feudal Europe, pre-revolutionary France and in a modern instance, Ireland, the same effect upon the middle class was produced by the same cause.

Ferrero in his *Greatness and Decline of Rome*, which, in the language of this eminent historian, "includes in its survey the entire course of one of the most remarkable societies in history, from its birth to its death—from the far-distant morning when a small clan of peasants and shepherds felled the forests on the Palatine to raise altars to its tribal deities, down to the tragic hour in which the sun of Græco-Latin civilization set over the deserted fields, the abandoned cities, the homeless, ignorant and brutalized peoples of Latin Europe," thus begins: "In the second half of the fifth century before Christ Rome was still an aristocratic community of free peasants, occupying an area of nearly 400 square miles, with a population, certainly not exceeding 150,000, almost entirely dispersed over the countryside and divided into seventeen districts or rural Tribes. Most of the families had a small holding and cottage of their own, where father and sons lived and worked together, growing corn for the most part, with here and there a strip of vine or olive" (Vol. I, pp. 1-2).

These conditions did not continue. After three

hundred years the small holdings were mostly collected in the hands of large landowners. There remained the public lands. These in large areas were then largely held on lease from the state by wealthy proprietors from among the Roman aristocracy.

The author thus continues: "Tiberius Gracchus had been brought up in his father's house under the most distinguished Greek philosophers of the day. He was familiar from boyhood with discussions on the difficulties that beset the Roman State. He had heard Rome's most notable statesmen lamenting the symptoms of social and military decadence, and crying out for some reform which would avert the impending chaos. What disquieted them most was the wholesale disappearance of the country population upon which the army relied for its recruits" (I, 55).

The story of how the Gracchi in turn tried to divide these public lands among the landless—only to result in turn in the murder of Tiberius and Caius at the hands of these same wealthy proprietors—is Roman history. Meanwhile the troubles of the remaining moderate proprietors increased. It was, of course, a progressive process. "They no longer found it possible to make a living on the old system by cultivating the vine and the olive for private use and growing corn for sale, and were now trying to grow no more corn than they needed for home con-

sumption, and to place oil and wine upon the market. Oil and wine not only fetched a relatively higher price than corn, but were also more easy to transport to customers at a distance" (I, 55).

"The fate of Tiberius and his schemes had demonstrated that it was useless to try to remedy the distress at Rome without first breaking down, or at least humiliating, the powerful faction of the great public landlords" (I, 57). This faction, however, proved too powerful for its opponents. "The great landlords, for their part, did not hesitate to take action. Profiting by their sudden access of power, after the murder of Caius, they carried through the Senate, the very year after his death, a law abolishing the inalienability of the lands assigned by the Commissioners" (I, 69). This left even the public lands free to be acquired by the same large proprietors and they did not neglect their opportunity.

"A new line of cleavage appeared in Italian society. On the one side was the great host of men who had lost all they had to lose in the world, the bankrupt traders and ruined landowners who were to be found in every corner of Italy; on the other, a small and grasping clique of parvenue millionaires. The moderate incomes, which might have bridged the gulf between the two, were gradually disappearing. It was a narrow and exclusive ring of capitalists, composed of a few surviving nobles, of some of the ancient Italian aristocracy and of

knights, plebeians, and freedmen, which was thus accumulating land in Italy, wringing fortunes out of the unhappy natives of Asia, and paying for them with the universal detestation of their countrymen" (I, 81).

"Justice had become simply one more instrument of oppression in the hands of the wealthy. Fraud and violence, extortion and bribery, were the familiar incidents of public life. At Rome, as at Carthage in the days of her decline, money was fast becoming the sole goal of ambition, and the supreme measure of worth" (I, 83).

"The people of Rome had one especial reason for discontent in the increasing frequency of famines; that of the year 75 had been particularly severe. It must be remembered that while the population of the city was steadily on the increase, wheat was steadily being replaced by the vine and the olive in all parts of Italy, and scarcely enough was now produced to satisfy the needs of the country classes. The problem of supplying the metropolis thus became more difficult every year" (I, 161). Rome had long been supplied mostly from abroad. She grew rich by looting the world, and with part of the proceeds of the spoil fed her proletariat.

In *Characters and Events of Roman History* the same author states: "That political form which was called with Augustus the principality, and from which was evolved the monarchy, would not have

been founded if in the last century of the Republic all Italy had not been covered with vineyards and olive orchards" (p. 188).

In remarking that Spartacus and his slaves, in a short period in this later time, created more consternation in Italy than had Hannibal and his entire invading army while marching and countermarching upon her soil for seventeen years, the author explains the reason to have been that Italy in the earlier time was sown with grain. In the destruction of vineyards and olive orchards the labor and produce of centuries is lost. Hence republican Italy—when a republic, far from Aristotle's ideal, of very rich and very poor—willingly, even gladly, sought a strong protector, though a monarch. We are here concerned only in noting the simple fact that the basic fund had become principally olive and wine and, for productive purposes, mostly economic corpse.

As land monopolization proceeded in Italy, as in Greece the phenomenon of monopoly appeared. In 18 B. C. Augustus proposed the *lex Julia de maritandis ordinibus*, a law which, according to Ferrero, "laid down marriage as obligatory upon all citizens, below the age of sixty in the case of men, and below fifty in the case of women" (V, 59).

Owing to forced immigration in the shape of slaves captured by the conquerors of the world the population of Italy had not greatly decreased, yet

race suicide had made such inroads upon noble Roman blood that the prime object of this law was to prevent its extinction. It sought to compel Roman aristocrats to marry only Roman aristocrats.

“Marriage with freedwomen—that is, the legitimacy of children by such marriages—was forbidden only to senators, and to their children for two generations in the male line; such unions were, however, recognized for the rest of the citizens. The man who was to personify the power of Rome in the Senate, to wield that power in the provinces, and to command legions must not be born of a pretty Syrian dancer or a Jewish slave; he must be the son of a Roman matron of free and pure Latin blood, to preserve the continuity of tradition in its full power and integrity. In other cases these mixed unions were tolerated, and the result was the disappearance of the old Roman blood in the course of centuries” (V, 59-60).

In Rome, as in Greece and in our world today, none within hailing distance of the “little minority of rich men” cared to forego all hope of reaching it by becoming, through raising children, fixed among “the numerous poor.” Few in the middle class dared risk descent in the social scale. Conditions thus constantly tended farther and farther away from the ideal state of Aristotle.

One great civilization after another has sunk beneath the waves of ignorance and barbarism because,

taking no account of the natural law of monopoly, it could not avoid its evils and therefore did not stand prosperity. Yet there is no inherent reason why a civilization should perish from prosperity. Prosperity is not poison. It is merely something that can be used poisonously. Used not poisonously but wisely, it will carry a people to the heights and keep them there. That it has never been so used is no proof that it cannot be. The murderous wild bull had to be tamed to become the useful ox and was—when men learned how. Previous recorders that

“Where wealth accumulates, . . . men decay”

have not noted that the wealth accumulated too unequally.

Had the first civilized people progressed equally and so prevented race suicide it would perchance have peopled the earth and continued progress unbroken. Savages could not have stood against it. Had civilization so progressed from the start, savages would have constantly decreased. Their opportunity to multiply and supplant the old civilization would not have opened. Since the discovery of America the white man has here, practically speaking, constantly progressed. The red man as constantly has decreased. Any inequality in the white man's progression has not as yet been sufficient for the red man to re-inherit his land. Had the old

Romans progressed equally, without race suicide, they would have settled Europe and their descendants instead of the descendants of savages in the Germanic forests would have settled America.

Many great peoples, fully civilized, have been conquered by their own vices, none by a savage foe. It is a popular error that Rome fell before barbarians. Had Rome remained the Rome of old, Rome would have retained the mastery of the world. When Rome fell the old Roman blood had long disappeared. The old Romans fell before monopoly and race suicide. Only their successors and slave descendants fell before barbarians less barbarian, though less polished, than themselves.

A civilized people is better able to withstand a savage foe from without in proportion to its civilization, i. e., advance in the arts. Civilization itself only aids and never weakens. Only men themselves with civilization weaken themselves. Engines of war vastly overpower any mere superior strength, or numbers, of savages. Rome conquered the world with the short sword at close quarters. Would legions with such strong right arms have been less invincible if, in addition to their swords, they had been supplied with rifles? To argue that civilization weakened Rome is to postulate that what only heroes could perform with poniards, and pygmies with powder, the heroes with powder and poniards could not have accomplished. The right arms of the so-called

Romans, at their fall, were physically as strong as ever. The only difference was that the same spirit no longer animated them. The stern old Roman stuff was gone. It had vanished like a dream and only in dreams returned. Thus the later inhabitants of Rome only dreamed that they were Romans.

Upon that point Edward Gibbon, the historian, in his *Decline and Fall of the Roman Empire*, writes as follows: "The lands of Italy, which had been originally divided among the families of free and indigent proprietors, were insensibly purchased or usurped by the avarice of the nobles; and in the age which preceded the fall of the republic, it was computed that only two thousand citizens were possessed of any independent substance. Yet as long as the people bestowed by their suffrages the honors of the State, the command of the legions, and the administration of wealthy provinces, their conscious pride alleviated in some measure the hardships of poverty; and their wants were seasonably supplied by the ambitious liberality of the candidates, who aspired to secure a venal majority in the thirty-five tribes, or the hundred and ninety-three centuries, of Rome. But when the prodigal commons had imprudently alienated not only the *use* but the *inheritance* of power, they sank, under the reign of the Cæsars, into a vile and wretched populace, which must, in a few generations, have been totally extinguished if it had not been continually recruited by the manu-

mission of slaves and the influx of strangers. As early as the time of Hadrian, it was the just complaint of the ingenuous natives that the capital had attracted the vices of the universe and the manners of the most opposite nations. The intemperance of the Gauls, the cunning and levity of the Greeks, the savage obstinacy of the Egyptians and Jews, the servile temper of the Asiatics, and the dissolute, effeminate prostitution of the Syrians, were mingled in the various multitude, which, under the proud and false denomination of Romans, presumed to despise their fellow-subjects, and even their sovereigns, who dwelt beyond the precincts of the ETERNAL CITY" (Vol. III, pp. 380-1).

Lest it be thought the blood then called noble was of older origin, we quote Gibbon upon a previous page: "The vanity of the rich, who desired to be noble, was gratified by these lofty pretensions. Encouraged by the applause of their parasites, they easily imposed on the credulity of the vulgar, and were countenanced in some measure by the custom of adopting the name of their patron, which had always prevailed among the freedmen and clients of illustrious families. Most of those families, however, attacked by so many causes of external violence or internal decay, were gradually extirpated; and it would be more reasonable to seek for a lineal descent of twenty generations among the mountains of the Alps or in the peaceful solitude of Apulia

than on the theater of Rome, the seat of fortune, of danger, and of perpetual revolutions. Under each successive reign, and from every province of the empire, a crowd of hardy adventurers, rising to eminence by their talents or their vices, usurped the wealth, the honors, and the palaces of Rome, and oppressed or protected the poor and humble remains of consular families, who were ignorant, perhaps, of the glory of their ancestors.

“In the time of Jerome and Claudian, the senators unanimously yielded the preëminence to the Anician line, and a slight view of *their* history will serve to appreciate the rank and antiquity of the noble families which contended only for the second place. *During the five first ages of the city, the name of the Anicians was unknown*” (III, 365-6). The latter italics are ours.

If any wish further proof that the blood conquered by barbarians was not the blood of ancient Rome, the monumental work of Gibbon also supplies it. The evidence lies in a comparison of the manner in which the ancient Romans met Hannibal, and their successors, under the “false denomination of Romans,” met Genseric the Vandal. The historian notes that: “During a period of six hundred and nineteen years the seat of empire had never been violated by the presence of a foreign enemy. The unsuccessful expedition of Hannibal served only to display the character of the senate and people; of a

senate degraded, rather than ennobled, by the comparison of an assembly of kings; and of a people to whom the ambassador of Pyrrhus ascribed the inexhaustible resources of the Hydra. * * * In the beginning of the war the Roman people consisted of two hundred and fifty thousand citizens of an age to bear arms. Fifty thousand had already died in the defense of their country; and the twenty-three legions which were employed in the different camps of Italy, Greece, Sardinia, Sicily, and Spain required about one hundred thousand men. But there still remained an equal number in Rome and the adjacent territory who were animated by the same intrepid courage; and every citizen was trained from his earliest youth in the discipline and exercises of a soldier. Hannibal was astonished by the constancy of the senate, who, without raising the siege of Capua or recalling their scattered forces, expected his approach. He encamped on the banks of the Anio, at the distance of three miles from the city; and he was soon informed that the ground on which he had pitched his tent was sold for an adequate price at a public auction, and that a body of troops was dismissed by an opposite road to reënforce the legions of Spain. He led his Africans to the gates of Rome, where he found three armies in order of battle prepared to receive him; but Hannibal dreaded the event of a combat from which he could not hope to escape unless he destroyed the last of

his enemies; and his speedy retreat confessed the invincible courage of the Romans" (III, 363-5).

Over six centuries later the degenerate inhabitants of the Eternal City, falsely calling themselves Romans, could, in the language of Gibbon, ambitiously derive "their descent from the heroes who had repulsed the arms of Hannibal and subdued the nations of the earth" by "adopting the name of their patron" but the heroic qualities of the ancient Romans they could not adopt and did not possess.

"Genseric boldly advanced from the port of Ostia to the gates of the defenseless city. Instead of a sally of the Roman youth, there issued from the gates an unarmed and venerable procession of the bishop at the head of his clergy. The fearless spirit of Leo, his authority and eloquence, *again* mitigated the fierceness of a barbarian conqueror. The King of the Vandals promised to spare the unresisting multitude, to protect the buildings from fire, and to exempt the captives from torture; and although such orders were neither seriously given nor strictly obeyed, the mediation of Leo was glorious to himself, and in some degree beneficial to his country. But Rome and its inhabitants were delivered to the licentiousness of the Vandals and Moors, whose blind passions revenged the injuries of Carthage. The pillage lasted fourteen days and nights; and all that yet remained of public or private wealth, of sacred or profane treasure, was diligently trans-

ported to the vessels of Genseric" (III, 602-3). With a smaller force than Hannibal's, Genseric thus sacked a yet larger Rome.

It should be self-evident to reasoning minds that those who thus interposed between themselves and the invader only the "authority and eloquence" of Leo with the "unarmed and venerable procession" of his clergy sufficiently proved, if they did not thereby admit, their non-descent from those who would have been "degraded, rather than ennobled, by the comparison of an assembly of kings." The invincible courage which so sustained the public confidence that the tent-site of Hannibal did not depreciate at public auction and the faith in their own valor as sufficient defense of their own homes, which did not retain reënforcements bound for Spain, could hardly have so utterly disappeared in lineal descendants. There was no reason for such to appear in successors in name only, named from former patrons, so richly deserving for their cowardice the fate bestowed upon them.

The Rome that fell was Rome, but it was not the Rome of old, nor was it the old Rome unprepared. The old Rome was inhabited by Romans. The old Romans had all departed long before, leaving Rome to successors not descendants. Concurrently with their leaving, according to Gibbon: "The taxes were multiplied with the public distress; economy was neglected in proportion as it became necessary;

and the injustice of the rich shifted the unequal burden from themselves to the people, whom they defrauded of the *indulgences* that might sometimes have alleviated their misery" (III, 596). Before the onward sweep of race suicide those had long fallen who "derived their descent from the heroes who had repulsed the arms of Hannibal and subdued the nations of the earth" and when at length the barbarians arrived it was equally a truism, according to the same historian, that:

"If all the barbarian conquerors had been annihilated in the same hour, their total destruction would not have restored the empire of the West" * * * (III, 597). The "scum gathered from abroad" could never have replaced "the cream of the country." Yet except for monopoly there was no more reason for the empire of the West to have lost its ascendancy by 400 A. D. than by 200 B. C. No such effect was visible at the earlier date, not because the Romans were not then civilized, but because they were not yet monopolized.

Just what remedy for monopoly in land should have been adopted by the ancients, it is not within the province of this book to discuss. We have to deal only with present monopoly which has not yet taken the form of landowning but has chiefly transferred itself to manufacturing. There it mainly appears as the evils of sellers. When the evils of monopoly in landowning earlier appeared in Eng-

land they were at least partially abolished by the abolition of the fee entail. Perhaps proper death duties, with the ancients, would have done the rest. The land was never successfully monopolized in one generation. A man passes on his property to his descendants or devisees by the consent of the state. Never should he pass any on to the injury of the state.

But the golden moments in which to curb the "little minority of rich men," and provide rules for the safe continuance of the state, cannot idly be allowed to pass by the middle class without their own later passing. When they no longer "outweigh in public importance both the wealthy and the indigent" the hour is generally too late. Then "the servility of the numerous poor" easily enables the rich to continue their march to ruin. So it was in Greece and Rome, in feudal Europe, and in all times and countries where the few, with mercenary armies and without a large middle class, have ruled the many. The servility of the army assured its loyalty—sometimes to a single tyrant—in return for better treatment than was awarded to the masses. This is but the true trust method, natural to monopoly—often exemplified today—of treating its own employees better than it treats the public.

Though monopoly in the civilizations from which we trace has repeated the result toward which we are progressing, the fact that no such result is re-

quired by civilization, or by prosperity, appears from the history of China. China has survived much more prosperity than ruined Rome and Greece. China's civilization was old when Remus and Romulus were cubs and it has continued practically unbroken, without race suicide, down to the present hour. China provided different rules from those of Europe. In China the scholar, not the rich man, has always been at the top of the social scale. The farmer ranked next to the scholar. The soldier was at the bottom. The Chinese religion also makes it of first importance to leave male descendants in order that the sacrifices for the parental happiness may be maintained. To that end polygamy and concubinage are both permissible and praiseworthy. This has not only circumvented race suicide but kept the Chinese poor, by our standard, through an excess of population periodically relieved by pestilence and famine.

The land has never been monopolized but is today held by small farmers. Of course the poverty of China has prevented any advance to a manufacturing stage where monopoly could there operate as with us. Monopoly has not operated with regard to the land, as in Greece and Rome, because the Chinese possessed different ideas of relative values. It was more important to them to be a scholar or a farmer than to be rich. Instead of leading to imitate the rich, the social pull was exerted to lead the farmer

to retain his land. As he was under the religious necessity of raising children, his religion also aided that end because he required land, in a farming country like China, to support children. The comparative general poverty of the country may have also helped in breeding few potential monopolists, or men of sufficient wealth to monopolize upon a very great scale, i. e., our scale. Yet China has many who could monopolize upon the scale of Rome and Greece. We are here concerned only with the fact that the land was not monopolized, many small farmers existed (a very large middle class), there was no race suicide, and Chinese civilization continued undestroyed.

On man's action, not on prosperity, the result depends. Nor does prosperity aid any dire result except as man lets it so operate. China, though poor by our standard, has long been rich by the early standard of Rome and Greece when, with them, ruin began. For a race and its civilization indefinitely to continue is thus seen to be not impossible where production is not monopolized. Whether production is monopolized depends on the nature and motives of man. To the same human nature the Chinese religion and social standards have supplied different motives. Hence the different result.

It is man's nature to monopolize. On his present plane he acts from motive, not instinct or intuition. The motive is always that which at the time of the

act is strongest with the person acting. It is not necessarily selfish in the personal sense. The poor widow robbed of her mite by the thug is struck down by his strongest motive of the moment—money. Sacrificing her life for her child, the mother nevertheless acts from the motive which is strongest with herself. The motive of self is not by any means always low or despicable. Actions for self are not always injurious or actions for others always beneficial to society. The general preserves his life and sacrifices privates that his superior genius may save the army and the nation. Misled sentiment petitions the release of a confirmed murderer and he immediately murders one of the petitioners. Society long ago found that life by motive without system was impossible. The motives of the moment can no more be left to jump at random, like uncaged tigers, than man individually can act with safety upon impulse.

Calmer moments bring wisdom; and reason, taught by experience, puts up landmarks to guide the erring passions. In the individual these form into habits; and in the state crystallize into customs. As there are good and bad habits, so there are good and bad customs. Both good and bad habits and good and bad customs may change from good to bad, or vice versa, with time and environment. The savage Scandinavian custom of killing the old as well as that of our Indians, who left them behind

with a little corn to die by their last camp fire, were necessary in their time to preserve the tribe. With larger food supplies they became unnecessary and were consequently abandoned. Yet the same custom, in effect, has been followed by men now living who in the Arctic were forced to act from the same motive.

Man's judgment of the necessity controls him always, not its existence. The proneness of humanity to err made it necessary for society to pass laws which should be stronger, as deterrents, than motives making for the commission of crime. Society never passed a law as a warning sign against a bad habit or custom until it was forced to do so. It was never forced to do so until the bad habit or custom became unendurable, i. e., reached the point where it was more trouble to endure the habit or custom than pass the law. Oftentimes individuals started customs which were somewhat in the interest of society and more in their own interest. Society never bothered with a warning sign until the gain to the individual or loss to itself became unendurable. Sometimes the wrong sign is put up. The road swerves but a little from the true course at the start, but in time the deviation may lead to the greatest peril. This is changed only when it becomes unendurable. This rule has always been followed by man everywhere and still operates today.

It was followed by the United States Supreme

Court in construing the Sherman law in the recent trust cases. Monopoly had grown so oppressive that before the argument the decision was a fixed point. The only uncertain element was how the judges would arrive at it. How they did arrive at it is still just a little uncertain, but it is certain that they arrived. No one then knew that the point was fixed or recognized the rule controlling. This was because it was not known whether monopoly had become unendurable. The judges' minds were deciding consciously or unconsciously, and doubtless unconsciously, whether monopoly had become unendurable. No one could tell in advance how they would decide that, but their decision is the final arbitrament that it had so become. The proof that they followed the age-old rule is that they did not follow logic or their own precedents.

The judges, consecrated ministers of justice, were unable to follow Caveat Emptor slavishly into barbaric commercialism. Though they saw not her scarlet letter, the arduous training of their lives, their purity and loftiness of motive—their rectitude of heart and blameless honor—were all revolted by Caveat Emptor's hideous standards. Consequently they put up the only warning sign they had and the only one in the legal thicket where they were, or on their side of the road. A way needed to be cut through the thicket to cross the road to safety and contentment. That the judges could not do without

an ax to cut, and without a light to guide. The road was accordingly left in the heart of the thicket but where the thicket was believed to be less thick. The fact that in that thicket no proper warning sign could be found or placed, did not prove that the road could not have avoided the thicket. A previous warning sign at the proper place would have so operated. The only point proved by the decision was the thickness of the thicket, viz.: That unendurability of monopoly had been reached.

If we believe the early story of the Garden of Eden man, or rather woman, there first started monopolizing by eating the forbidden fruit—even in spite of a warning sign and at the behest of competition. His nature has not since changed and is the same today. “Thou shalt not,” whether mandate of Hebrew Jahveh or Sherman act, is never effective when it is not the stronger motive. In the affairs of civilized men it has long been found that things which men are prone, much more obliged, to do some way anyway, are more easily controlled than prohibited. The exact way in which such things will be done can be safely guided by warning signs which men by preference will follow. If the road be barred by the sign “No thoroughfare” they will jump the fence and trample many gardens the road could have avoided. The journey’s end has a stronger lure than any particular way of getting there.

The manner in which at each turn to raise the proper motive in the wayfarer requires careful study but well repays the student. Whenever diplomacy is available in the treatment of human difficulties it is superior to force. Force is a last and on the whole unsuccessful, though then needful, resort. Sometimes it is necessary to destroy to build again. When it is not, force is failure. Force then proves only lack of seeing eyes—that the wheel must again go round to opportunity on the chance that, next time, a seeing eye will meet it. Force now utilized upon the trusts, i. e., in decreeing dissolutions, is a waste of strength and wealth. Diplomacy, operating upon their self-interest, can make them servants of the common good. It is only necessary to raise new motives in monopolists. That is easily possible to the proper warning sign. Monopoly now, without a warning sign to keep it from contracting the basic fund, constantly and abnormally depletes it. The successive results are increase of the cost of living, race suicide, loss of the middle class and—ruin. Monopoly will cease its abnormal contraction of the basic fund if it is allowed to work for itself only by working for all the people. It will so work if it is not allowed to discriminate against any of the people. The warning sign needed, in essence, is only what the fathers in 1776 thought they had set up for all time: “No inequality before the law!” Only a

difference in detailed expression is required. Liberty has been held by the old precedents to mean merely personal liberty. Personal liberty does not mean much, in modern conditions, without business and industrial liberty.

No comfort lies in the futile hope that the vastness of modern wealth is so great that it will resist the ancient process. Size in this case can affect only speed. The process has been long begun. The wealth of Greece compared with that of earlier times was vast. The wealth of Rome was vast even compared with that of Greece. Yet both equally yielded to the same unseen forces,—inexorable, uncontrolled. The wealth of both finally became divided among the few to the exclusion of the many. At first even the many prospered much, compared with preceding ages, though the few prospered much more. When in due course of the natural process prosperity reached its apex, the prosperity of the rich still continued to increase though at the expense and finally to the ruin of the poor. But the poor cannot be ruined and the rich escape all consequences. Unjustly acquired wealth is in the end even more dangerous to the wringers than to the wrung. The present inexorable workings of the process appear in the figures of the Department of Commerce and Labor.

The per capita wealth of the United States in 1850 was \$307.69, in 1912 \$1,310.11. Yet in the United States millionaires and multi-millionaires in

1912 held much more than sixteen times the amount of wealth they held in 1850. Allowance must be made for a four-fold population increase. In 1850 a millionaire was a rare bird. John Jacob Astor was reputed to be America's only multi-millionaire. In 1915 the Government collected an income tax of \$6,439,004.54 upon net incomes exceeding \$500,000. If each of these incomes was \$500,001 there were 345 persons who paid this tax. It is currently reported, unofficially however, that forty-one persons paid an income tax upon a net income of \$1,000,000 or upwards. This disproportionate increase of wealth in the hands of the few necessarily means a corresponding failure to increase on the part of the many. Many more people per thousand of population are now, necessarily, under \$1,310 than in 1850 were under \$307. Possibly more people per thousand than then are now under \$307, though such statistics are not available. While a fortune of \$1,000,000 was large by any standard in 1850, a fortune of \$16,000,000 is now small compared with many of the largest present accumulations. This increased disproportion bears down the share of the many and affords an index of the present system's march toward ruin.

As monopoly under the present system breeds monopoly, present monopoly of capital will bring monopoly of land. Pursuant to the same natural process of past ages, those with land to sell will sell

it only to those with money to buy. In time those with money to buy will all be monopolists, first of capital, then of land. Only such will have money to buy. Without land or capital labor can produce nothing; with either monopolized, little; with both, not much. As monopoly rises into the ascendant labor takes the downward track. However vast present capital, its monopolization means but repetition of the ancient process: Monopolization of the land—and our submergence to the depths once reached by

“the glory that was Greece
And the grandeur that was Rome.”

Just where in our present barbaric commercialism the seed of monopoly is located will be pointed out in the next chapter. Later a remedy will be presented. But, first, the reader will be furnished with the facts and given full opportunity to diagnose for himself the real seat of the difficulty.

CHAPTER II

BARBARIC COMMERCIALISM: ITS BANEFUL SOIL AND FATAL SEED

AFTER viewing the results of monopoly in the past it is apposite next to scan its workings in the present. In commercial competition man has never wholly emerged from barbarism. Though even war has been regulated, the regulation of business competition is not yet among the no less renowned victories of peace. The wild tribes who chaffered with the soldiers of Alexander on the confines of the world used the same system of business competition which is followed today by the largest trusts. They used it better only as they used it less. Methods of war have been improved beyond the great world-conqueror's dream. Yet business competition still is, as it then was, abreast only with the progress in the art of war, not of Alexander, but of the barbarians he conquered. He only longed for another world to conquer. Business competition has conquered it together with his own. It is therefore not surprising that present-day business competition is often likened to war by those

who wage it. It is like war—after the older fashion—before the Red Cross. Worse, it is like civil war. True, its bullets do not directly kill. They only strip. The barbarian was often kinder in killing before stripping instead of after.

A pirate, from the honest voyager's economic standpoint, is merely one who takes from those who cannot defend themselves that to which he is not entitled. Our present competitive business conditions allow the same evil. Selling to "meet" competition is exactly the method, in essence, of the pirate. The competition "met" gives those who can defend themselves an advantage not allowed to those who cannot. These latter who pay the higher price—and often only its height permits the competition to be "met"—fail to endure the other economic requisite of suffering by piracy only if they are not entitled to buy at as low a price as the customers profiting by competition. They are entitled so to buy if the seller is not entitled to refrain so to sell. But the seller cannot so refrain and observe the rule of equity,—equality,—which bids him treat alike all his fellow citizens and brothers and beside which it is entirely unimportant whether or not he "meets" competition. The interest of all must come before the interest of one.

The idea that competition must be "met" (at the expense if possible of those not within the competitive area) is based upon the erroneous notion that

the market, or as much of it as he can get, is the private property of the seller to be obtained or retained by fair means or foul. The fact is that the market is as much the property of the buyer as of the seller. As citizens and brothers they have an equal joint interest which it is inequitable for either unequally to usurp. It is as inequitable to force one buyer to pay more than another as it would be to force the seller to receive less from one buyer than another. Though the seller volunteer to undergo his inequity in order to "meet" competition, that affords no justification for inflicting a wrong upon any buyer unless one willingly submitting to an injury (because for his supposed ulterior advantage) thereby acquires the right to visit a similar injury upon any innocent person he may select.

As a general rule, it is not of benefit to society for any seller to "meet" any more competition than he can meet with equality to all his customers. Any such gain to the seller is, in general, merely piratical plunder from those of his customers who happen to be defenseless. Of course all such sellers do not make gains. Neither did all pirates. If we assume a seller is already selling to all his customers at the price naturally fixed under the rule of equality and then "meets" competition with a lower price to some new customers, the loss if any is borne by himself instead of by a portion of his customers. If there is still some gain to the seller it is only trans-

ferred to him from the other seller. But there is also a loss to society which is accurately represented by the economic disadvantage at which he supplies those new customers as compared with the cost of supplying them from the seller who would naturally supply them if all sellers observed the rule of equality. If this were not so, those new customers would have previously fallen to him at his equality price. If they were not buying from any one before they would still have fallen to him without a cut, had he been their most economic seller, when their need of such goods became equal to their brothers'.

Benefit to buyers from the cut, where it is one necessary to club competitors out of business, will be but temporary. The loss to society will be permanent. The fact that such buyers preferred to pay some other seller's equality price before he offered to cut his, proves that the other seller's equality price was cheaper for them and therefore more economical for society, i. e., the state. This will hold true absolutely if the two sellers do business for the same per centum of profit and the latter under familiar principles will constantly tend to an equality. The loss to the state is the difference in cost, to the two sellers, of supplying those new customers.

It is true that as every individual differs from every other, so all differ from the economic man. Yet it is human experience that in the long run all tend economically to approximate him. In civilized

commercialism (i. e., a commercialism of equality of opportunity) all will be able freely to approximate themselves to the economic man as closely as each may find it for his interest and effectively desires. No oppression will bar them apart.

Thus it is seen that when a seller in civilized commercialism "meets" competition by partial cutting the state ordinarily meets an economic loss through a commercial pirate. Even if the seller stands this for a time, buyers will bear it most of the time. For the suppression of piracy of whatever nature, it is best to have all sellers, willingly or unwillingly, recognize that their brothers better deserve to be met on a plane of equality than competition on one of inequality. No one is entitled to any more business than he can do to the economic advantage of the state. When the state's loss through an individual's business or any extension of that business exceeds the gain he comes in conflict with the good of all. As piracy of the seas long since yielded to this rule, so sometime must the piracy of commerce. The exact crime should of course be defined and the exact men responsible for it personally punished.

A corporation's stockholders are not to blame if ignorant of the plan and without part in its execution. Therefore their money should not be taken from the common treasury. That treasury is a trust fund for creditors even before stockholders. Its depletion can at most only punish the guilty with

the innocent. Such rude justice is unworthy of a scientific age. Its only justification would be the absent ground of absolute necessity. There is a path straight ahead which is much shorter than the roundabout one of indirectly influencing officers and directors by supplying motives for supervision or careful election to the stockholders. The officers, directors, managers and controllers can be directly reached, just as murderers are now reached, by the criminal law. The men who cause the unfair competition should be personally punished. Fine and, if necessary to prevent the evil, imprisonment should be personally and not vicariously inflicted. As in the case of murder, few will be found to commit the crime when the punishment is not to be borne by some one else.

It may be said that such a criminal law would be unconstitutional, as any man may sell his own property for any price he pleases. The answer to this is that the principle that any man may sell his own for any price he pleases is subject to that larger principle that a man must so use his own as not to injure others. A man may shoot across his own land with a rifle which is so carefully adjusted that the bullet will stop on his own land. He would not be allowed to use a higher-power rifle which would carry across the lands of others, although he would still be using his own rifle. There is nothing more fixed or sacred in the so-called principle that a man may sell his

own for what he pleases. That statement of his right was accurate enough while he was using, so to speak, a low-power rifle, but it became inaccurate with the use of the high-power rifle of nation-wide competition.

The spirit of Anglo-Saxon jurisprudence would preserve the rights of the humblest and jealously make the poorest the equal of the richest before the law. As to the old wrongs they are now so equal but not as to the new. There is no reason why the smallest dealer should not be able to compete in his own way with the largest trusts according to his ability and opportunity. Very often a single workman can please a small circle of customers better than the largest concerns. The single workman gives individual care and minute attention to the smallest desires of his patrons. A cobbler for instance may make shoes for a small circle of men and, preferring hand-made shoes, they may be willing to pay him more than the price at which they could procure stock shoes from a large factory. The factory will not be able to get his customers away simply through the economy it can make in production. But it might get some of them away if it sold them shoes at one cent a pair while driving the cobbler out of business. It would then raise the price. Unfair competition such as this, destructive to the cobbler and brutal in essence, should be penalized. The dissolution or destruction of shoe

factories is not necessary to reach the evil. Yet in the case of large trusts like Standard Oil and Tobacco, the Roosevelt administration adopted just that remedy by starting suits which worked out their natural result in Mr. Taft's administration to Mr. Roosevelt's and most other people's disapproval.

The Standard Oil trust has seldom bored for any of its own oil. It preferred to buy the oil from innumerable oil seekers who themselves stood the loss when they did not find. If such a law against unfair competition in selling as we propose had been in effect and had been enforced, the Standard would have been unable to work undue harm either to its competitors in refining or to dealers. If it had not been able to put the former out of business there would have been plenty of competition for the purchase of crude oil. The Standard would also now, perhaps, be a small concern proportioned only to the limited ability of its managers, not to unlimited, extortionate and adventitious oppression. This state of things would have led to each plant supplying that portion of the country which it can supply most cheaply. It would have left natural competition to operate in each section instead of allowing the Standard to monopolize the whole country by making one part of the country for a time carry another.

Of course there are pipe lines and railroads to be considered. Corporations which need a carrier's franchise are in another category. The regulation

of railroads seems fairly assured. There is no necessity for allowing a merchandising oil company to own a pipe line any more than a railroad. Both are public service corporations. Corporations were originally formed, among other things, to make the transfer of interests easy. They have no necessary advantage in creating a monopoly. So far as their size now aids them to create a monopoly it can be easily rendered impotent for evil by following the spirit of the common law according to well-established methods. Size aids only in unfair competition. Under the fair competition of civilized commercialism it will be harmless. A \$100,000,000 company cannot better afford to lose \$1,000,000 a year than the \$100,000 company can afford to lose \$1,000 a year.

In the case of the Steel and other corporations which themselves own (or lease) the major part of a natural product within the nation's boundaries, there is a monopoly of ownership (or control) as well as a monopoly of the means of distribution. By the removal of all tariff favors these corporations can be placed upon an equality with those who do not own or control the nation's sources of supply. There is a world-source for iron and steel and, once the excess tariff has been removed, the Steel Corporation will be on a par with the Standard Oil Company in this respect. The Standard has come to its position of greatness because it was able to undersell competitors piecemeal, not because those

competitors could not buy oil from producers. The Steel Corporation has to some extent, aided by the tariff, been able in addition to narrow the source of supply for its competitors by buying or leasing the most extensive ore fields. Were any excess tariff removed the company would have to meet competition from those who would have access to the ore fields of the world which it cannot yet monopolize. But monopoly of ownership will count for less under the proposed statute, for it will become monopoly's own self-interest to sell low enough to all to sell to the number of customers who furnish its largest total profit at a single price. That will be far lower than the present highest price to some. "Dumping" will be abolished. Much of the present mismatching of trust production, which poisons the channels of trade and brings panics at shorter and shorter periods, leaving times between almost all hard, will be prevented.

Monopoly is an evil only when it is monopoly at high prices. Monopoly at low prices is a blessing yet unseen by mortal eyes. Under civilized commercialism it will open to their vision if there is one combination anywhere which can be everywhere more efficient than anybody else. This will mean a low price on a nation-wide scale. In that case there will be no one anywhere who will not be able to put more money in his pocket by buying from monopoly than by making the article himself. This is now

unknown and, except for civilized commercialism, will so remain.

Publicity automatically prevents piratical selling to two buyers before their faces. The retailer in general cannot do it and does not try. The wholesaler does piratical selling only by practising secrecy. He claims to do no wrong because chancellors have not yet found his collar nor the penal brogan his trousers seat. The wholesaler's system is to sell to all at the same time, like the retailer, but he differs from the latter in making every trade a barter. When fully utilizing the present system he gets all he can from each instead of trying to make an equal price for all. He gets much more than he could get by such a price because he gets the full benefit of all the high trades.

Assume a merchant has for sale 111,111,111 barrels of oil which could all be sold at \$2. They cost him \$1 per barrel and he could make a reasonable profit at \$2. If he sold all at \$2 he would make \$111,111,111 profit. This is 100 per cent. but not satisfactory to our wholesaler. Further assume that there are men in the country who will buy some of the oil at higher prices. One has a sick mother and needs a lamp at night. He will give \$10, if necessary, for one barrel rather than leave his mother in the dark. Ten other men have sickness but are not quite so well-to-do, and they decide that \$9 is all they will pay or go without. There are some 100

merchants who will each give \$8, 1,000 will give \$7, 10,000 \$6, 100,000 \$5, and 1,000,000 \$4, rather than close at dark. Their stores are of varying prosperity and each decides on the figures at which it will pay to shut up shop. Other barrels can be worked off on those who either need them less or have less money, 10,000,000 at \$3 and 100,000,000 at \$2. Our wholesaler sends at the same time to each buyer a different salesman who makes a sale for the most his buyer is willing to pay. As many markets are made as there are buyers instead of all coming into one market, as they do in economic books on the theory of exchange. The wholesaler makes many markets in order to avoid making one price. He does not change economic theory. He merely so stacks the situation that economic theory works for him instead of for *all*. The pickings for the wholesaler who, meanwhile, denounces political economy as merely "theoretical" are as follows:

Barrels				Profit
1	@	\$10.	\$	9
10	"	9.		80
100	"	8.		700
1,000	"	7.		6,000
10,000	"	6.		50,000
100,000	"	5.		400,000
1,000,000	"	4.		3,000,000
10,000,000	"	3.		20,000,000
100,000,000	"	2.		100,000,000
<u>111,111,111</u>				<u>\$123,456,789</u>

If he had sold at \$2 he could have sold to the same customers. Any one who will give \$10 for a thing will give \$2 for it, as will any who will give any more than \$2. What the wholesaler did, in popular parlance, was to grab the whole market for all it was worth. In terms of economic precision, he grabbed all the markets for all each was worth. Though the buyers had the power to bargain collectively, in the absence of a single-price rule they took no benefit whatever of this collective strength. Each was as the single laborer before the day of labor unions. Our example is a perfect illustration of the extreme monopoly market (or markets) in barbaric commercialism. We have assumed the salesmen out-chaffered the buyers in each instance, but whatever price is agreed upon between buyer and seller becomes the highest the buyer will give because it is the highest he has to pay. These figures can be changed to fit any actual monopoly sales, but the principle and practice will remain the same.

If the seller sells at the same time to different buyers at different prices some buyers are suffering injury by paying more than others. If the difference be slight the principle and effect are unchanged—only the amount of the piracy. Our wholesaler took in \$123,456,789 profit by piracy when he would have taken in \$111,111,111 profit by fair trade and equality to all. The temptation to which he yielded was

\$12,345,678, but great merchants fall for less every second of the day in barbaric commercialism. He made on 111,111,111 barrels of oil, which cost him \$111,111,111, \$12,345,678 more profit than civilized commercialism would have netted him. We have taken an extreme illustration to show the principle, but it was by that principle, however small the shadings or cuttings of price at times, that the millions of Standard Oil were made. The privilege which allowed discrimination between buyers thereby gave the advantage which inevitably led to elimination of competition and enthronement of monopoly. If the Standard had not become that monopoly, another would. It captured the high trades but let none of the small ones get away if it could help it. Why? Because it was necessary to make large sales. Standard Oil could not have been built up, even on the high trades, except by selling an enormous amount of oil—about all there was to sell.

Let us apply civilized commercialism to the same market and the same figures. If the wholesaler wished to sell his whole 111,111,111 barrels at once, he would have to make the price \$2 at the start. Only that would move them. If he asked \$3, those last 100,000,000 barrels would not sell, as those who bought them could or would pay only \$2. Civilized commercialism is perfectly agreeable to the seller

fixing his price at \$10. It attempts to do no man's business for him. It merely supplies fair rules and leaves the working out, subject to the rules, to himself and God. He can wait as long as he likes for customers, but he will not find any except that man with \$10 and a sick mother. Meantime he will send all his salesmen everywhere and will be paying all for no results unless they manage to find the \$10 man.

Even if they find him quickly, it takes the time of his thousands of salesmen to sell one man one barrel. The time of the others is wasted until the price is put down. This waste of time means increase of expense per sale unit and makes waiting at the highest price the most unprofitable and therefore least desirable point to wait. He will have made \$9 profit when he makes that \$10 sale. Waiting the same time at the same expense with the price fixed at \$9 he would have sold ten barrels at a profit of \$80. No man will long wait, under such circumstances, to search for the price of greatest efficiency. This does more good to a larger number, including himself, by selling the most goods which bring the most profit. It supplies more of those who need the product most and can use it most effectively in productive consumption. This is the price line, when there is actual or possible competition, of equal and exact justice to all which Justice herself holds before his eyes as an ideal for which to strive.

It may be said by some that this is only the present line of "all the traffic will bear." Such fail to note that the traffic will bear much less than at present when it bears but an equal burden everywhere. "All the traffic will bear" means to the trusts, at present, the sum of the different burdens each locality will bear, even where it does not mean the sum of the burdens each individual in each locality will bear. When those burdens, local or individual, can no longer be added together by monopoly, necessarily a price which will bring large sales will bear less heavily than now on some localities. That monopoly now adds these burdens, at least by localities, is unchallengeable. No trust now sells everywhere at an equal price, or at a price equal except for freight.

"Dumping" is only another present method of giving some localities lower prices while exacting higher from others. At present, unpatriotically, foreigners are thus favored and the home market is jealously reserved to pay the highest price. In civilized commercialism he who dumps at all will dump for all. As will be shown hereafter, dumping is but the penalty of his own misjudgment,—properly to be atoned for only by himself.

It should be observed that this ideal price line will operate as a fully effective lure only to sellers who in civilized commercialism will have at least possible, if not actual, competition to fear. Potential competition we define as that competition which is

not now competing but is ready to do so in the absence of danger from unfair tactics. Possible is a still wider term. In civilized commercialism actual competition will probably exist in all manufacturing industries. It will spring up in any locality—however small—it can efficiently serve. Under the rule of equal price it will know monopoly cannot touch it where it can produce more cheaply. If through control of raw materials, or for any other reason, any manufacturing industry turns out to be a natural monopoly, without competition actual or possible, it will need regulation even to price fixing like public service corporations. But if such exceptions exist, they will be few under civilized commercialism and can be made exceptions to its general rule when necessary.

Public service corporations, like natural monopolies, are in a different class. There the individual is not now at liberty to compete even if he so wishes and is willing to lose his substance. He cannot, of course, successfully compete on a small scale with a large railroad. Supplying a small locality with a railroad is not feasible. One who would compete with a transcontinental railroad must himself build a transcontinental railroad. He cannot build a new railroad, competing or otherwise, without the consent of the state. The state has the right to fix rates which it deems reasonable for public service corporations. Wherever there is a right there is al-

ways a corresponding duty. Having exercised such right, it is the state's duty to allow the public service corporation to receive such rate and the business upon which it was based until conditions change.

This assumes that the then business enjoyed sufficient service. Obviously it would be unreasonable—and the rate no longer reasonable—if immediately after fixing a reasonable rate proportioned to the then traffic, the state should before any change in conditions cut in half the field of income of such corporation. A monopoly is, and must be, subject to full regulation by the state. Regulations to prevent development of its evils are likewise properly prescribed by the state. Otherwise a power within the state becomes superior to the state itself; a few citizens over-ride all. But the form of such regulation or regulations yet remains in each case for solution. Governmental fixing of prices is a last resort, cumbrous but necessary in the case of natural monopolies. The state which fixes prices for the trusts must itself face additional duties. Consumers are not alone entitled to the state's protection. Sellers of raw materials and wage earners, as well as the trust, must be considered. Monopoly cannot any more be left to work its way unchecked with them than with consumers. The state must therefore, as the need arises, fix the prices and wages the trusts, which are natural monopolies, must pay.

Once started on the road there is no stopping point

short of state socialism. Price fixing means nothing else. This plan, then, should never be adopted where it can be avoided. The government now fixes, in the last resort, railroad rates and the charges of public service corporations. The next step has already been forced upon it.

Having fixed rates, the state now properly allows no new competitor until conditions change. In New York, for instance, a new railroad or trolley line cannot be built without a certificate "of public convenience and necessity" from the Public Service Commission. The state thus performs its duty not to fix a reasonable rate with one hand only to make it unreasonable for the corporation with the other. The same rule must, justly, be applied to manufacturing corporations if government fixes prices. They must be guaranteed the field. It would be unfair to them, and the capital invested in them, to fix a price proportioned to allow only a reasonable profit from all the present consumers and then allow new competitors to take away part of those consumers. The price fixed would not then bring reasonable profit owing to smaller sales. Yet the old companies would be unable to raise prices. Two unnecessary difficulties are thus at once introduced into commerce. Delay through applying to legislatures and public service commissions can be endured before building a new railroad. The opportunity for going into commercial business will often have

passed before such an application can be heard. Great loss will also often result before the law can be changed to change prices or a commission act.

Business is therefore best left to regulation by competition, rather than by government, wherever possible. Where it is not, government regulation is the last resort of stern necessity. Competition is natural regulation, government artificial. Natural relief here, as generally elsewhere, is better than any other because quicker acting and more complete. It is elastic and self-regulating. The experience of mankind has proved that the individual can do better for himself all those things within his power to do than the government can do them for him. This is only saying that that government is best which governs least, i. e., the least not necessary. Individuals created government, not government individuals. Government was created to give individuals as much freedom, not as much government, as possible. By extending the rule properly, because necessarily, applicable to public service corporations to new fields where it is not to the full extent needed, we should be not only ignoring the underlying principle of our government—liberty—but sinning against light.

Compelling sellers to sell to all and to all alike is not treating them as public service corporations because their prices are left to be fixed by themselves. Such regulations compel equal treatment of

all citizens and brothers and merely prevent injury of some by others. This latter society always has the right to prevent whenever in its judgment the injury ceases to be trifling. None of the liberty of those necessarily regulated, in the common interest, should be unnecessarily taken away even at their own request. To take it would only weaken them for future usefulness. Their training or elimination by the hardest competition possible, so long as it is fair, will be best for the state. It is the state's interest to have only the fittest survive when the rules are so framed that they survive best who serve the state most. To keep any alive by legalizing monopoly, fixing its prices and giving it the field, would injure the state by softening the fiber of those thus kept alive and preventing the development of new, harder fiber in others by fair and open competition for all. Legalizing a monopoly means closing a door of opportunity. None should ever be closed unless necessary to keep danger within,—never to keep opportunity from passing out among the people.

Monopoly's greatest bane for civilization is its unprogressiveness. It keeps on producing what it has been producing until it overproduces. Human nature, acting only from motive, will improve nothing when improvement is unnecessary. Monopoly, from its very essence, ordinarily finds new methods and improvements useless. Why spend money for im-

proved machinery when more than its additional profit can be taken from the consumer by raising the price—and without buying the new machinery?

True, enlightened monopoly would spend the money, lower cost of production and increase its sales, but for effective results man in general needs a stronger motive than enlightenment. Results are uncertain and improbable, except in front of the iron spur of necessity. Socrates said ignorance was the base of folly, sin and crime, and in large part he was right. Socrates thought man, enlightened, would avoid those evils, and he was wrong—except as to a stage of enlightenment yet to be reached by mankind in general. Man in general, acting from motive, prefers the immediate to the remote. The pleasure and profit of the present, and the longer pain of the future, are invariably selected by most, rather than the greater good. He prefers to “take the cash and let the credit go.” For this there is a reason. Human life is uncertain. Man knows that he, individually, may not remain to be the creditor or to suffer the longer pain. He grabs the immediate prize in fear lest, otherwise, he may never enjoy any. Thus monopoly, thus monopolists: “After us the deluge—but *we* shall not be deluged. Let those who come after take care of themselves—as we are doing.” Idle is it to expect monopoly eagerly to effect improvements when it does not have to do so.

Yet it is only by thus constantly improving methods and production, even if some fair passing around of prosperity is secured, that civilization can continue to progress, the race to increase and man fulfill his destiny. Mankind is always between the upper and nether millstones of lack of improvement in the arts and increase of population. By constantly improving in the arts and sufficiently increasing production (without mismatching), he can constantly increase his numbers at the natural rate. If he does not so improve and increases his numbers unduly he brings upon himself the evils well described by Malthus. Inevitably a country which improves production fast enough to increase population at the natural rate, and retain every one on the same scale of prosperity, will soon outdistance a country which remains stationary in production and population. By all human experience monopoly has proved a potent agent working not merely for the stationary stage, but for retrogression. To make proper improvements and safeguard the future, monopoly needs to be motivated by the iron spur. Otherwise it is but the educated elephant who said: "Every one for himself," as he danced among the chickens.

Recurring to our example of a monopoly oil market, it will in turn take all the salesmen to sell the ten \$9 men and the others down to the bottom price when all will be able to find occupation. This use-

less expense for salesmen very greatly increases to the wholesaler the cost of waiting. His entire expenses as well as sale expenses are going on while he waits. His business is to sell goods and he can make money only by doing so whether he makes a small or large profit. Every wholesaler will desire to wait as little as possible under our system because while he waits he loses. Accordingly he will put his price down to attract trade. He will put it down as a matter of course if there is competition, but even a monopolist will put it down some, for it will not pay to wait. If he waits ever so long at the highest price he will make only \$9 and sell one barrel. He will very quickly decide to make more. He can do so in one way only. By putting the price down far enough, enough will be sold to pay expenses.

Thus some high trades are lost. Some buyers make, though dealing with a monopoly, and pay far less than could have been obtained under the present system. The system of civilized commercialism is thus seen to be one that, to some extent, beats even natural monopoly. Monopoly of course puts its price down some now, but it takes high trades when it can get them. It gets as many of them as it can. It gives no equal price all the time, and it "cuts" and "dumps." How badly civilized commercialism will beat it will depend, in the particular business, on the relative expense of waiting. No business can live on its one high trade and it will have to give

somebody some advantages that it is now, at least occasionally, taking.

In the aggregate, over the present, this will be enormous and will make for efficiency and lower cost of production. Only by selling for less can the seller get in more buyers and sell more goods. Only by selling more goods can he make more money. Instead of having the public in his grasp at his own prices—all each man is willing to pay under the iron spur of his necessity—the monopolist is subject to the equal and beneficent yoke of civilized commercialism. It is for his own interest to put down prices to a point that will bring more profit than a higher price. This benefits more people, but he is not obliged to do it. He has the power to take all the high trades and may do so by paying for waiting. The great benefit to the state is in added inducement to efficiency. He will see the lure of larger profits in lowering cost of production and then lowering prices. Larger sales and smaller profits will become his motto. He now thinks to get the higher trades anyway and he does not need to lower cost to get them. In them he sees the big money and efficiency has little lure compared with the lure it can be made to be.

Monopoly cannot live without large sales and if complete it makes all sales that can be made at a profit. It can make money only by its sales and if it cannot sell for more profit must sell for less.

Quick sales and small profits will be a true maxim for business in civilized commercialism. By wholesale piracy in barbaric commercialism it is now turned into quick sales and large profits. This is some part of the secret of high prices and high cost of living. "Big business" by commercial piracy is receiving the highest prices it can get instead of the lowest it will take. It will take the lowest rather than wait for the highest. It will not wait long for anybody if it has to treat all alike. Waiting would not be practical. "Big business" will never be impractical by standing in the light of its own immediate self-interest.

If he had wasted his time waiting for the highest purchaser, our richest oil millionaire would still be today a one-barrel oil merchant and be sitting on the barrel "cussing" trusts. Barbaric commercialism's plan of allowing wholesalers to take in at the same time the highest with the lowest trades makes for inefficiency in production because it is made unnecessary to produce cheaply. The high prices automatically make higher prices and still higher because it is against nature, in general and in the long run, to reduce prices except under the iron spur of necessity. The trusts and wholesalers are entitled, justly, to try to get those high prices only by waiting for them—and paying for them. They are not entitled to make people wait to pay higher prices than they make to those who do not wait. Wholesale

business no more than retail can afford to wait. It must make some sales to pay expenses and it will make sales at any price if it can get no more and can see no hope of more in waiting. High prices for trust articles leave less money for other articles, though nowadays most articles are trust articles and little money is left.

When Œdipus guessed the riddle of the sphinx, Thebes was ridded by its jumping off the cliff. Our sphinxes will do the same if we tell them, after guessing their riddle, that we guess they jump the cliff. Placing the rule of equality in the penal law will land them there never again to rise except by the sweat of their own, not our, brows. The only difference between this penal Gary dinner and the other is that though a dish comes on he does not like no guest may be discourteous enough to leave the table. The wholesomeness of the entire repast is sufficiently attested as the dish least liked is best for health. Huckstering, whether in crowded Broadway or chambers of commerce, is never barred because it is huckstering but only for the common good. When it conflicts with that the law says: "Move along!" No laws can be misused until they hurt all law makers and remain the law. Even one good custom can corrupt the world unless the world corrects the custom.

The trust and monopoly problem is now with us because an English common law judge once pre-

ferred Caveat Emptor to Caveat Venditor. Opportunity for business oppression was left wide open by the unequal rule of Caveat Emptor: Let the buyer beware. The seller was given by law the privilege the poacher takes. The lowest pothunter has yet to snare a bird able to beware. Caveat Emptor can with equal truth be freely translated: Let the seller snare. The buyer's right only to beware means the seller's full right to snare. Had the opposite rule been adopted (Caveat Venditor: Let the seller beware, viz: Sell a sound article or refund the price), buyers would merely have been given equal rights with sellers. One means: "The buyer has no rights—except to beware." The other: "The seller has but equal rights—let *him* beware."

Yet the early preference has since controlled our law. The difference that this judge's choice made was then invisible and slight. Two seeds were offered him. One was a tare, the other wheat. He selected the tare because it was the color of his English oak. The other he could not see was Roman wheat, for it has taken a thousand years for the tare to ripen its full-blown blossom of privilege which alone precludes mistake. That trusts now exist in countries with the Roman code (which includes Caveat Venditor) is beside the mark, for there liberty and the common law, moving from precedent to precedent, are absent. The rule of equality could not develop in Roman lands where privilege was kin.

Privilege was alien only where the Anglo-Saxon, keeping up with Liberty, trod his glorious path of freedom. Three things were necessary then and still: He must keep up, keep on the path and keep up equally. None may forge ahead by forcing another behind. Whenever this happens it is the duty of all to stop—and Liberty stops with them—to smite the thief of the common good. *If there is no such smiting, Liberty outsteps all.*

Had our law started by granting buyers equal rights with sellers, judges would merely have held, as they have always felt, that there is inequality and oppression in a seller's retaining money for goods he has not sold. The step remaining to the next precedent, as obvious as necessary under free institutions, would have given buyers equal rights among themselves. This would necessarily have secured for sellers equal rights among *themselves*. Only by oppressing *some* buyers and favoring others does the great octopus, Monopoly, first begin to acquire sufficient strength, as a seller, to oppress all other sellers. Caveat Emptor thus both left the way open to unregulated competition and, later, partially prevented perception of proper regulations. The natural result of unregulated competition is monopoly.

Had the wheat been taken its flower would have been its corollary. By the tare well-grown the starting wheat was stifled. Had the field of freedom our

fathers seeded contained no tare, no special privilege would now be there. In our national structure every scullion chafing in the basement would have a master key, in the rule of equality of business opportunity, by which to unlock any commercial chamber of the beauteous mansion above which he could find vacant and by his own efforts, in the interest of all, make livable. Moreover the present usurpers of some of those fairest chambers, provided by the new house rule with only a like key, would find themselves obliged to vacate all those they cannot use, in the interest of all, as well as some one else might use them. One result: The house of our fathers would have chambers enough for all. All who could deserve, under equality of opportunity, would be in chambers. The beauty of this key, forged by Justice, is that it opens no door that is not deserved. It enters no room not earned by service. The house we are blessed with deserves such tenants and such tenants only. It was designed and constructed for no others. Under the great Emancipator it endured great stress that the pattern of the master key might not be lost.

Justice fears no contact with the populace or contamination by the market place. All places look alike to her provided they are peopled by men and women. Justice provides the same law for the markets as for the courts. All she asks the courts is to apply it equally. In their keeping they do not

hold justice jealously to be guarded as a banker guards cash. The supply is not decreased by dispensing it. No watch is needed lest any of it get away, for it outdoes even the widow's cruse. The more dispensed the more is left, nor have courts the right, though they have the power, to prevent its dispensation. Their constant vigil should only be to see that they do not kill where they did not create, viz., to see that they maintain, continuously, equal freedom, including equal business and industrial freedom—not merely equal personal and political freedom.

As religion good enough for Sunday is none too good for the rest of the week, so justice good enough for courts of equity is none too good for business. Even to forward the mistaken object of *Caveat Emptor* it is best to have the same high quality of justice everywhere—in court and out. *Caveat Emptor's* great merit was supposed to be the discouragement of litigation. Hardly was any discouraged because judges to combat oppression invented implied warranties. The amount of that unredressed injury which rankles because denied even a hearing, was increased. It is unliquidated litigation that hurts—where the sense of human wrong feels that it is given a stone instead of a day in court. Dispensing justice, not discouraging litigation, is the business of courts. They will discourage litigation most by dispensing justice best. With Wendell Phillips

they should entrench themselves "upon the principle of human freedom and leave the working out to God." Human freedom is equal freedom. This does not mean that they should always follow logic, for logic, as a Lord Chancellor of England has written, "is not law." Logic is the stern bailiff—necessary and strong but not necessarily of judicial timber.

They should follow only the law, founded upon equal freedom, and where it is necessary to make new applications to fit justice to new conditions, new combinations of facts and circumstances, they should never lean away from justice to look at the docket or the clock. By so doing they take the working out of human freedom into their own inferior hands and entrench only oppression. He would be a bold man, and probably not a lawyer, who should assert that Caveat Emptor decreased even liquidated litigation.

Unliquidated litigation can have been decreased by Caveat Emptor in only one possible way. It can only have been decreased by increasing the minuteness of buyers' inspections over what it would have been under Caveat Venditor. If a buyer under that rule had not inspected and the seller would not refund, the buyer could get his money back only by suit. Therefore the difference between the amount of alertness and curiosity created in a buyer by the possible necessity of a future law suit which he may not win, compared with that created by the possibility of a sterile suit which he can not bring, consti-

tutes the sole benefit here and it is nil. Any buyer will be just as alert and curious, in advance, to avoid one calamity as the other. All future law suits look alike to him. Even if his lawyer wins he feels he loses. This paste diamond of Caveat Emptor was concocted by common law judges when petty larceny was punished by death, and from the same evasive reasoning such harsh punishment bred. All crimes were visited with the same extreme penalty because men would not leave the working out to God.

They held crime sin. Sin was anti-Christ. Even the least sin deserved, they said, the punishment so foully inflicted on the innocent Christ. The extremity of punishment could not be recouped too quickly for them and so they would do it themselves. After they had worked that out there was no greater penalty to give the greatest crime, so they gave them all the same. They fixed their eyes on the criminal and forgot, besides God, the state. It was not for them to suggest the deserts of the criminal. Vengeance is for the Lord. He has said it and judges cannot overrule or distinguish it. Yet judges who thought they were following the Word piously sent poachers to the gallows for shooting a partridge although the Bible names no such offense. They did not doubt that the maxim, Equality is equity, would uphold them. The defect in their

reasoning was that they were acting outside their jurisdiction.

We have learned that the state has no right to punish for the Lord but only to protect itself. We have not yet learned that the state has no right to allow one citizen to punish another even if he does it indirectly. While the state now allows itself to punish only in the common interest it still allows some citizens to punish others, in their own interests, although this violates the equal right of all to go unpunished by each other. This cannot co-exist with equal freedom and equal justice *for all*. The state cannot blink it by saying that the rule of equal justice applies only when dispensed in court. Justice is dispensed *in* court, but it is not dispensed *from* court. It falls from Heaven. Such is its divine nature that it covers all with its gentle dew when ignorance, folly or oppression do not prevent. All men are *born* with an equal right to the pursuit of happiness—to that equal freedom which is only equality of opportunity. In other words this is a world of order and freedom, not of chaos and oppression.

As to the second branch of our inquiry,—many times more liquidated litigation has been made by Caveat Emptor than was prevented. The injustice of the rule led judges to refine, as they had in criminal law, to avoid the repulsive cruelty of oppression. They invented warranties galore. They al-

lowed recoveries against the wrong although they did not retrace and find the right. Implied warranties, sales by sample (which have now been logically reconciled in New York by being held express), sales by description, fitness for particular purpose, latent defects, fitness of food for immediate consumption (if sold to consumer by dealer and not by dealer to dealer!), not to mention others, are but monuments of unsuccessful struggles of English judges to prove they had been right when they were wrong. Sticking to the wrong could not prove it right. All felt the wrong. None knew it, because Caveat Emptor was not recognized as spurious. The guinea's stamp had to be accepted as a guinea but with much wriggling and cavil.

In Noy's Maxims, c. 42, it is said: "If I take the horse of another man and sell him, and the owner take him again, I may have an action of debt for the money; for the bargain was perfect by the delivery of the horse, and Caveat Emptor." As it was plain that the strumpet Caveat Emptor here consorted with crime, the judges decided to introduce the implied warranty that when a man sold property *as his own* he warranted his title and that the warranty *could* be inferred from his conduct in so selling. This was the rule by Blackstone's time (Bl. C. 451), but his great predecessor, Lord Coke, was still under the full spell of the patter. Coke says in Co. Lit., 102 a: "Note, that by the civil law every

man is bound to warrant the thing he selleth or conveyeth, albeit there be no express warranty, but the common law bindeth him not unless there be a warranty, either in deed or in law, for Caveat Emptor."

In English and American law the multitudinous cases upon implied warranties,

"Thick as autumnal leaves that strew the brooks
In Vallombrosa,"

come from not originally adopting or later changing to the simple rule of Caveat Venditor, viz.: "The seller has but equal rights—let *him* beware" i. e., let the seller sell a sound article or refund the price. Failure to apply this simple rule, which would be the first one thought of by a child purchasing a poor piece of penny candy, has formed a labyrinth of subtlety not measurably exceeded by any subject in the law. Willingly no lawyer without a taste for Kant ventures into it. No judge without a Kantian mind can fully understand, or even then to a layman satisfactorily explain, its hidden mysteries. All this devious weaving of unnecessary legal lore Caveat Venditor would have prevented. If then some sellers had forced suit before refunding, there would have been but one question in the case: Were the goods sound? The legal contest would have been over the facts—as it should be—and not over a quibble whether the court is justified, "for Caveat

Emptor," in doing justice even if the facts require it. This subject has thus come more to resemble speculative metaphysics than the plain rule better taken from the mouths of babes and sucklings.

Interesting as it would be to follow fully why the English judge and the Roman prætor took different seed, suffice it here to note that the decision of neither was accidental. Each was the resultant of his time and class. Each gave justice as he saw it to the class he wished to get it. Trade to both was vile. In Rome the ruling class were *buyers*, in England *sellers*. Our progress over each is easily observed and exactly measured. With us the "better" class is lost because all are one and that the best. The rule best for *all* has thus become necessary.

A simple codification of this rule will be found in a succeeding chapter. But in order that no possible advantage may be taken of the reader he must be allowed to weigh civilized commercialism in its full scope not merely with an unprejudiced but also with a fortified mind. To the end that he may array himself in all the mental habiliments both of the trained economist and the seasoned lawyer, the next chapter presents a near view of additional workings of barbaric commercialism and also a biography, in short and simple annals, of the poor old Sherman law.

CHAPTER III

BARBARIC COMMERCIALISM AND HARD TIMES INCLUDING THE SHERMAN LAW

IN their search for high trades and the whole market (i. e., all markets) our manufacturers gradually pile up an immense hoard of dead, commercially-poisonous, mismatched commodities which periodically become the economic monster called Over-production. This creature breeds panic. Panic leads to hard times and these by a painful, round-about and largely unnecessary road bring us again to the highway of prosperity to repeat the process. In dealing with disease it is wiser to prevent its contraction than to allow patients to be inoculated in order to cure them. An equal amount of unnecessary waste of time, labor, capital and happiness can be avoided by preventing panics instead of creating them. The manner in which our present commercial system tends to create, instead of prevent, panics and hard times is here set forth in some detail. Many writers have dwelt much upon monopoly's tendency to encourage sloth. Monopoly's

other, and perhaps greater, evils also deserve attention.

At any given time in any country, as in the world, there is a certain amount of exchangeable commodities, productive and unproductive, and exchangeable land, productive and unproductive. These somebody wants at some price who has either money ready to buy or something else readily exchangeable into money at some price. "Some" price means a price which is at least fairly reasonable in ordinary times. It does not mean a panic price. This exchangeable land and these exchangeable commodities now in this country, as well as the hard money ready for exchange, is the basic fund of the United States and merely a part of the world's basic fund. The latter also includes the world's hard money ready for exchange. Whether in the fullness of time either increases or decreases, it is still such basic fund. Other and formerly unexchangeable land and commodities may at times enter and leave.

It may be added to by new production, or reproduction, and some of its parts may withdraw from the magic circle for various reasons as by destruction, or wasteful or unproductive consumption. Consumption which decreases value is unproductive consumption. Value is power in exchange. Any part productively and profitably consumed remains in the basic fund with added value. Familiar examples, generally speaking, are leather made into

shoes, cloth into clothes and flour into bread. When there is productive, profitable consumption labor is enabled to congeal into capital and thereby increase the basic fund.

Aside from labor, the world's chief means of wealth increase is its basic fund in which all, with a share of it, have a common interest. It is not the sum total of the world's wealth. Outside of it are all unexchangeable commodities and land, whether productive or unproductive. But what is outside is at the moment, for exchangeable purposes, only economic corpse. "Exchangeable" is of course used in the sense above expressed—at some price.

The basic fund is therefore the medium in which, in the main, that commerce moves which is profitable to both buyer and seller. With the expansion and contraction of the basic fund, business shuttles from prosperity to hard times. Leaving out of account as, generally speaking, unimportant the panic-price transactions in the otherwise unexchangeable, it is only by exchanging part of the basic fund that one at any particular time procures another part, unless he receives it by gift, theft, or in return for labor or on credit. In no other way can he ever acquire any part except by holding something unexchangeable until it becomes, if it ever does, exchangeable.

The productive land and commodities which are unexchangeable are of comparatively minor impor-

tance, while they remain in that condition, in adding to the world's wealth. Otherwise they would be exchangeable at some price. It is common knowledge that very little is unexchangeable at a fair price which is of much importance as an income producer. Land and commodities which are unproductive as well as unexchangeable obviously add nothing while they remain in that condition. Only by increasing its wealth can the world progress economically. Only by increasing its basic fund can the world thus progress much or with much speed.

Such increase is necessary to satisfactory, or even appreciable, economic progress. Fixation of the basic fund with increase of population means, as a general proposition, certain retrogression for all without property and with only labor to exchange. Fixation without increase means, for such in general, stagnation without progress. The former means the nearing bread line, the latter that it is near enough. Society cannot avoid heavy indirect effects from dire results to labor. Practically speaking, retrogression for labor means retrogression for all.

The beginning of a period of prosperity is postulated at the start in order that we may not project the reader into gloom unless he sees himself projected there by barbaric commercialism. All wholesale and manufacturing sellers, monopolistic or otherwise, hereafter designated simply as sellers,

now join in the wild rush for high trades. Times boom. Most people turn over more money and many make more. Gradually, and soon more rapidly, prosperity climbs toward a dizzy but seemingly endless apex, when one morning some manufacturer finds himself without quite enough cash on hand to meet his pay roll.

To the bank he goes as usual for the loan heretofore ready but now refused. The president tells him he would like to help him, his paper is of the best, but loans are now as large as the capital and surplus make safe, and even larger. Business has been good so long he has become free handed in loaning, but he must retain enough money in the vault to cash a check for a depositor who has notified him of his coming. He asks the manufacturer, as a personal favor, to try another bank.

Several are tried with the same result, and finally the manufacturer tells one of his customers who has an overdue account that he must pay his bill at once. The customer then makes the round of the banks with a like result. He calls one of his customers. None has any more money than the manufacturer. One after the other, when pressed, they go out of business, accompanied by panic, and down to failure like the row of bricks in the books on economics.

It has been stated that over-production causes all this, though some are inclined to think it more at-

tributable to under-consumption. The peculiar thing about either explanation is that no one has enough of anything he can sell, or would like to buy, and every one would like to consume more of everything he wants. The best economists correctly diagnose the difficulty as mismatched production. The wrong things have been produced to supply productive wants. Monopoly always does that in great excess because it does not have to do otherwise. It will not look out for any one else when conditions do not compel. Every seller in the period of prosperity, seeking most the high trades, has been a speculator as well as a seller. He has produced as much as he could of what he wished to produce, and gambled that he could not over-produce his market.

Economic corpses have accumulated in the channels of trade. They accumulate unduly in a shorter or longer time—in monopolistic times shorter—and the former basic fund is then largely basic death. There is then too little basic fund to allow free exchangeability of its commodities among people in general. People in general have no money and no basic fund commodities of the moment, only corpses.

The mass of the people are full of desire for, but without exchangeable commodities to get, money with which to purchase the basic fund commodities desired. Yet only by the freest interchange of basic fund commodities among all the people is each surer to get that which he can most profitably and pro-

ductively consume. Only by constant exchange can there be constant increase of wealth through commerce. Only by constant increase of wealth can there be economic progress. Economic progress, with wealth well distributed, is rather essential to all other progress. Without progress there must be retrogression or stagnation. Stagnation is but retrogression from what might have been. Whatever makes economic corpses makes for retrogression, the nearing bread line or the bread line nearer than it might have been.

With less or little effective demand for money, however much wishing for it, prices go higher and higher. Every one has corpses of his own. No one else wants or will have them. The part of the former basic fund that is not now corpse is much desired by everybody. Most of it, perhaps, is money which is certain to be most desired by everybody. The money is most desired because it can be exchanged for any part of this balance of the former (the present) basic fund. Nothing else can, as most are now afraid of being taken in by a corpse. Many are already ruined by them. Such corpses, or part of them, sometimes come to life again, but while dead they are very dead and no part of the basic fund. They are dead because of no present living use in the world. They are not production increasers or natural breeders or, if they are, are unexchangeable from some defect or their own excess. The only

reason money—that immortal part of the basic fund—never becomes corpse is that it cannot be killed. Prosperity under the present system would kill it if it could.

Money's inherent and predetermined nature as the agreed medium of exchange preserves its inviolability and makes it the soul of trade rather than the root of evil. Money has been termed the "root of all evil" by people who, looking at their corpses, thought the money still rooted there. Aristotle said money was barren. Bagehot said he imagined it. Bagehot was not an Aristotle. He was a banker. He admitted money was no breeder if held by "quiet ladies, rural clergymen, and country misers" but thought in the hands of business men it was a different matter. Even this great English financial expert mistook a pipe for a root. Really the "root" by which those people lost their money was not a root at all but a pipe. It led through the corpse into the seller's pocket, where the money lay unseen, unsoiled and unsunken. They blamed the money for their own foolishness because they saw the money go, but not the foolishness that came, although looking at it constantly and never seeing the money again. All they had sunk was a corpse and there was no money in it.

They did not know it was a corpse, although smelling it and shortly—after eating it—making themselves sick trying to digest it. Panic is but the colic

pain of the strangulated economic intestines—which some would cure with more corpse, and some with arithmetic. Few realize that doing nothing is often doing good. Unexchangeable and unproductive land and commodities thus held upon speculation for the future greatly increase as good times wane from their unnoted apex. Every one then expects every corpse to spring to life, i. e., enter the exchangeable realm of the basic fund and at a profit.

As money is the medium of exchange between all commodities in the basic fund, the ratio of each to money is fixed under the law of supply and demand by the relative amount of money there compared with itself. "Amount" here includes speed of circulation. If there is little supply of a commodity there and much money, the price of the commodity will be higher than when there is little money and much of the commodity,—provided demand remains the same. Dearness escorts scarcity, plenty cheapness.

Lower prices mean greater demand for money and higher less. One with wheat who sells a bushel for a dollar will, if his demand for money becomes twice as great, sell two bushels for a dollar—and the price of wheat immediately falls from one dollar to fifty cents a bushel. The same seller, if his demand for money had decreased one-half instead of increasing, would have sold only one-half a bushel for a dollar—and the price of wheat would then

have risen from one dollar to two dollars a bushel. This assumes that the supply of money and demand for wheat remain the same. Effective demand by basic fund commodities must be kept in mind, as wishing for money by those who have nothing to exchange for it will get none of it.

Labor is never in the basic fund as labor. All man has he has taken from the earth, and by earth here are included the waters and the air thereof. Labor has been applied, but it was always applied to something as labor applied to nothing produces nothing. Labor reaching the basic fund has been productively and profitably applied and reaches there in some commodity or in land. All past labor unproductively applied reposes in economic corpses or was otherwise wasted. Future labor is but potentiality waiting to be duly assigned to one class or the other according as it makes good or wastes its strength, i. e., turns out to be profitable and productive or unproductive. The wage fund is always, for practical purposes, but a part of the basic fund.

It is only that portion of capital there, including money, and barring corpses, which at any particular moment is all that is obtainable by labor for wages under the law of supply and demand. Any general and serious reduction of the basic fund, such as has been described, is at once severely felt by labor. As commodities rise in price the purchasing power of wages lessens. When the cost of

living floats quickly skyward where it is hanging now, labor most suffers.

The theory of the wage fund here set forth is in accord with the weight of general economic authority. It is of slight importance to our subject—such fine distinctions belonging rather to books upon wages alone—to note the doubt of Adam Smith as to whether food for immediate consumption is part of the wage fund. The decision of this delicate question has perhaps been confused because the employer is the payer of wages. The employer pays wages, but the workman receives both wages and food from the basic fund if the food was exchangeable. If it was not he eats an economic corpse.

The late General Francis A. Walker, former president of the Massachusetts Institute of Technology, in his well known *Principles of Political Economy* differed from the great majority of economists as to the proper wage fund theory. The theory followed above by us he held had been adopted by English economists like Mill because in England wages were generally paid in advance. Here in America, in his view, wages were not often paid in advance but oftener out of the product, as many employers had no money to pay wages until they made it. It was his opinion that the wage fund consisted of an estimated portion of the future product. It may be observed that while this influences the bargain of employer and workman, future product is no part

of the basic fund. However good a bargain the workman may make, he will not get any pay from an employer with no money if the product turns out worthless instead of as estimated. Consequently in such cases there would never have been any wage fund although the workman has lived out of one while working! The workman has in reality been speculating along with his employer and has received in his living his due part of the wage fund that existed at the start. The wage fund was so small he had to work for a bare living and a speculation. If it turned out a bad speculation he had been working for a corpse (described with precision in popular parlance as "a dead horse") and was lucky to have lived.

As the demand for money increases or decreases,—the supply of and demand for any exchangeable commodity, as well as the supply of money, remaining the same,—the price of the commodity goes down or up. It becomes necessary to give more or less of the commodity for a dollar. If the demand for each commodity and its demand for money remain the same and the supply of one commodity increases some while that of the others decreases more, the supply of money remaining the same, the other commodities will rise in price more than the one will fall. If the demand for money decreases more than the supply of one commodity increases, demand for it remaining the same, the price of that

commodity will yet rise although the amount of money remains the same. The wide, general and serious decrease of the supply of most commodities in the basic fund, their demand and the amount of money remaining the same, will greatly decrease the demand for money in spite of some slight or even considerable increase in the supply of one commodity, demand for it remaining the same. The price of that one commodity, even, may then rise greatly. Other commodities will rise still more.

In this world of natural law economic laws admit of no repeal. We cannot conform them to ourselves. We must conform ourselves to them. In every field man exists best under a system which, by conforming to natural law, allows nature to work for him instead of forcing it to work against him. If man is cut off from air for a short time he dies. Only by complying with the law of his nature—to breathe air—can he live. So on non-compliance with any natural law man risks and receives the natural consequence. The natural consequence of our present system of business competition is maleficent monopoly. It is inherent and inevitable. Originators of the present trusts thought they were doing, not a bad, but a good thing. Acclaimed at the time as captains of industry, specious and futile advantages incidental in an evil system caught the public eye.

These men were really generals of destruction. Decrease of cost of production on a large scale led

them to assume, if they thought of it at all, that productive, profitable consumption was both unparticular and unlimited. It would have been plain to organizers of the Steel Corporation that they could not productively and profitably consume all the coal in the world, were it dumped at once into Pittsburgh. Nevertheless they acted on the theory that the United States, or at least the world, could at once productively and profitably consume all the steel and iron products they could dump into it. They therefore forbore looking before dumping.

Their theory was wrong. They were not theorists. They were "practical" men. The banker-organizers thought salesmen could attend to consumption. For the employer they did, for a while, but trouble was only laid up for the future. The country was soon filled with economic corpses. In time such selling would dry up the basic fund except for its money—all of which the sellers of corpses would hold. Long before that point is reached—as human nature is but human—the holders of money reach trouble. Trouble also reaches actively for them.

Larger combinations or trusts than can efficiently sell only to productive consumption are injurious. Economic death comes from putrefaction in the economic system. Separate small sellers—each watching his own market and trying hard not to overplunge it—give life, for they leave, if fully suc-

cessful, no corpses. If tolerably successful they leave many less than a blind insensate seller who thinks only of placing everywhere all the goods each community could possibly use under the most favorable conditions. This is the limit of that policy. It is the trust's ideal. When it is shaded the principle is unchanged. Trusts and large organizations, while somewhat economical in production up to a certain point, are less efficient in supplying only productive consumption. Detailed wants of multitudinous buyers all over the country they cannot possibly know, or forecast, as well as the small manufacturer or dealer in each place, intimately acquainted with his locality, can serve his patrons. He knows their wants because he knows his people. In that way the whole country cannot even be glimpsed by one man, and any number of experts or salesmen avail not. Their incentive and desire is only to sell as much as possible. As unthinkingly as unnecessarily, the plant is over-extended. Cutting can easily be done locally, they reason, if necessary to dispose of partial excess.

Just as it is the nature of cold to freeze, so it is the nature of maleficent monopoly to squeeze. To preserve himself from either, man equally needs protection. Under a proper system of protection either can be made man's servant instead of his master. Natural law, with man no longer unaccommo-

dated to it as in a state of nature, will then work for him instead of against him.

The sense of wrong and injury that comes from the possession of unproductive economic corpses cannot be ignored. Those who have them feel they are not to blame for the demise. Envy grows of those more fortunate. None can see that one class, more than another, was entitled to avoid corpses or receive resuscitation. The deserts of the fortunate are not apparent, and cannot be, as they do not exist. Monopoly, once started, has a tremendous unfair advantage. Great lack of sagacity is needed in its managers to encompass failure for themselves. Hundreds of times they fail sufficiently to put them out of business in a small competitive community. They are not now put out as they ought to be because the large community stands the loss itself.

Trust managers affect to think theirs a hard lot. Often they are but clerks in caliber who in a hard lot under proper conditions would quickly be put in some under-bookkeeper's crib where they belong. Trust conditions cannot force them there. They do not have to stand their own losses. The traditional doctor who buried his mistakes is entirely out-classed.

Competition under natural law in a state of nature has three stages:

1. Competition between individuals starting prac-

tically as equals. This lasts until some become young octopuses.

2. Competition between octopuses and individuals. Generally the individuals do not last long at this stage. They are soon either swallowed or exterminated.

3. Competition between octopuses.

The last leads to elimination of competition by the creation of a great octopus. The process of its creation is in one of two ways, both equally natural, the choice of which is determined wholly by the human factor.

Much has been said and written about the great sagacity of the elderly ex-head of the Oil trust. A veritable Bismarck of business he has been painted even by his enemies. Yet remorseless but successful use of the power of monopoly is no more deserving of credit for business ability than Torquemada for battle bravery. Both succeeded by destroying. Both destroyed by oppression—the one as much by business ability as the other by battle bravery. Some ability both needed. The ability most needed was that hardy kind which most easily resists the sufferings of others. As a matter of fact, this man needed, and used, only sufficient business ability to go into the oil business when it was young and stay in it sufficiently long and successfully to build up a leading industry in a small state. That took some business ability but many have dis-

played as much, for they have done the same. Plenty of men could not do that but the number among our citizens who could is legion. Probably he has latterly had thousands of men working for him abler than himself who, under fairly competitive or civilized-commercial conditions, would soon have outdistanced him. He outclasses them because he has also had monopoly working for him.

After getting near the top in one state it was only necessary to pick off the weakest competitor, through underselling that competitor's trade, to become larger. This process went on step by step with the weakest in turn, naturally and relentlessly, until competitors formerly strong had become weak by comparison, as they were bound to do under the system followed. It was always possible for the large company, having a wider trade field, to live on what it was making somewhere else although losing by local cutting. Loss could not hurt it so long as it made more than it lost. Its wider field gave superior advantage. With each competitor killed off, its "velvet" field was a little larger and its grip therefore a little stronger for its next victim. Effort did not tire. Effort, once the chain of causes started, added new strength and new vantage ground. Weaker competitors had the chance of a single soldier in a circle of sharpshooters. Whether he will kill one of them is uncertain. That they will kill him is certain. Competitors who were not stub-

born—with archaic ideas about a free country, impossible of application to the conditions existing without civilized commercialism of which they had no vision—easily and promptly combined with the nearest octopus when so requested. The only alternative was extinction and in the state of nature then existing it was a natural extinction. The boa constrictor cannot help constricting. It is its nature. Without it it would be but a snaky string and not a boa constrictor.

At the end of the second stage of competition the field thus came to be occupied by a few large competitors, all small octopuses. Of these one only was billeted by natural law in a state of nature (i. e., by competition unregulated) to be the great octopus. For the others the billet by the same law was extinction or combination with the greatest. The recipients of the billets remained to be determined by competition in its third stage, i. e., competition between octopuses.

If one trust had not forged to the front in the oil or any other field another would. It was the law of life in those conditions, as the system was wrong. Life was death, and death was life, for the time being, and no one alone could change the law all must obey. The successful ones were absolutely within their legal rights under the system in use, and but followed the course compelled by the first law of nature under the conditions. If they had not

grown big, others would, and they would have been swallowed instead of swallowing.

Necessarily business in this country could not long be kept on its early basis of small dealers locally scattered. That was precluded by Watt, Morse and our immense natural resources. Steam and electricity made monopoly possible in just the form it took here—the trusts—though it has taken other forms in other times in other countries. Here it was only necessary for one competitor to get a tolerable start of others to begin the picking-off process. The territory of the weakest was then covered. Its customers were sought out even by detective methods,—considered fair in war as they were if the war was righteous. The war was righteous if the system of competition so far pursued in the world's history was in the new conditions still fair. But it was not. The new conditions demanded a new system which was not supplied.

Trust builders could not understand why they were accused of unfair methods. They but continued the picking-off process. They were only doing exactly what their smaller neighbors were doing though the latter were often as much meaner as smaller. The former even softened, as unnecessarily as illogically, the asperity of the situation by often taking important but non-dangerous competitors into the trust—at a price. Gentlemenly methods of warfare were not unregarded even by

the most hardened and bloodstained captain of industry or, as we prefer, general of destruction. Declarations of war were sent with proper notice. If disregarded, hostilities commenced. When the war was over and the slain lay at his feet the commercial ghoul,—himself but a victim of a bad system,—a barbarian only because the light of civilized commercialism had never penetrated his cranium or his camping ground, always said: "I wanted him to come in. It was his own fault that he would not." And it was. But generally there was combination instead of extinction. The force of the trust maxim, "Where combination is possible, competition is impossible," was recognized even by the largest competitors.

Competition to the bitter end was impossible without loss to all, death to some. None knew his billet. It was business to take the part of the loaf handed by combination. Certainty was preferred to uncertainty. As soon as the field was occupied only by a few large competitors, combination was possible. It was also natural. Combination then became but competition's natural result according to natural law in a state of nature. This was the result with human nature reasonable. With human nature stubborn the equally natural result was extinction.

Another thing the ghouls never could understand was why they were constantly chased about the

graveyard—never from it—by officers of the law as if they did not belong where nature placed them; and where it was only right for them to stay, as there was nowhere else for them to go. The only choice in barbaric business conditions was to be a ghoul or a defunct—eat or to be eaten. Just why ghouls should be blamed because they had not themselves been eaten was not clear to them and assuming barbaric commercialism proper cannot be made clear to any one else. There is, under the barbaric system, no reason whatever.

The ghouls often started business in a small way and gradually grew until they grew great enough to ghoul. Ghouls ghouled together and then, in the absence of the usual combination, on each other until only one big ghoul was left. He turned around to feel that pat of approbation expected at the ring-side or on the gridiron and a policeman, who had been applauding, said: "I arrest you. You won the fight." Naturally some instinctive counter-resentment was aroused among the ghouls by this despotic treatment. They were not allowed to feed in peace in their own graveyard after they had made it.

This they considered taking private property without compensation. In this they were right too. The law they and their fellow citizens lived by had not been broken. A bad but permitted system had merely been pushed to its extreme limit. Its evil effects, unnoted in smaller fields, demanded some

relief, but the relief demanded was not given. The law kept on encouraging them to fight to win and win the fight. It then arrested them for fighting. Small wonder that the ghouls organized a law-protective society of their own! A few legislatures, judges, senators, and perhaps others, were among the paid retainers of the yard, for the purpose both of keeping policemen out and giving warning from the headstones when they approached. In its leadership one ghoul became the country's most copious ready-letter writer.

An enormous numerical force of legal talent attended upon these ghouls. Night work in graveyards is not conducive to legal vision, and it is not surprising that none was developed. Just ghoul work was done among the ghouls a-ghouling. In thirty years of nightly prowling and mighty gorging not a single principle was discovered by ghouls or ghoul-clerks morally to justify their orgies. There was none such to discover. They looked for none against themselves. That they left to prosecutors who sternly prosecuted but out of the old books based, for the new conditions, upon wrong foundation principles.

The Sugar trust was dissolved by New York in 1889; the Oil trust by Ohio in 1892 (*People v. North River Sugar Refining Company*, 121 N. Y. 582; *State ex rel. v. Standard Oil Company*, 49 Ohio 137). These were those early trusts—whence the name—

in which the stock of former competitors was held by trustees. The Oil trust had existed in this form since 1882, the Sugar since 1887. Both continued to exist. Monopoly was affected as little by these earlier as by later dissolutions. The form only was immediately changed. In place of trustees holding companies were substituted. As the states in which these and other holding companies were incorporated did not, and other states could not, dissolve them, Congress became the final hope of relief. The Sherman law was the only result.

This act was passed in 1890 (26 Stat. 209, c. 647). It provided: "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

"Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor" * * * .

Not until 1896 in the *Trans-Missouri* case did the first serious contest under this act reach the Supreme Court of the United States (*United States v. Trans-Missouri Freight Association*, 166 U. S. 290). Before going into court it was not apparent to the trust lawyers that their clients had violated either

section. Their association, a substitute for a holding company, was not a direct restraint upon commerce. No trade or commerce whatever was restrained by forming the holding company. That could be done only by some act of the officers or directors after the company's formation. How could a later illegal act of such affect a company's legal continuation or relate back to make the formation of a company, legal in its inception, illegal? The question seemed already answered in the trust's favor by the Knight case (*United States v. Knight*, 156 U. S. 1). The government was not seeking to punish individuals but to dissolve the company. The company in the view of its defenders was merely a business convenience. They claimed the same right to use it that individuals have to form partnerships.

Contracts and combinations in restraint of trade or commerce were believed to be only those between competitors which limited output, reduced competition or fixed prices by a direct contract or combination for that purpose. Throwing a number of companies into one with such indirect result seemed to be no more than individuals did every day with perfect right when they entered partnerships. There had never been any law against competitors becoming partners, and the act was not believed to prohibit it. If so intended, it was thought more apt words would have been chosen. There was also in their favor the ironclad common law rule of con-

struction that courts will strictly construe all statutes in derogation of common law rights. As such right to unite as partners had existed at common law, it seemed that this act could not reach it unless it was given an impossibly indirect, *ex post facto* construction not allowable under this rule. That individuals instead of becoming partners had pooled their interests in a corporation made no difference. Courts every day hold corporations, in effect, mere forms of business partnerships. The trust lawyers in the beginning thus thought their clients secure under the first section at least.

They were more secure under the second. In no aspect could a holding company be considered a monopoly at common law and furthermore the acquirement of monopoly by individuals was not prohibited by the common law. At common law monopoly was something acquired by grant from the king. In earlier days England's king, like other despots, had fallen into the habit of granting exclusive favors to his friends. These special privileges to favorites were called monopolies. Perhaps the custom started as supposedly a good one to encourage infant industries. The effect was soon observed to be the same injurious one that arises from all such abnormal feeding of those who should feed themselves or fail to feed. A heavy growth of monopolistic underbrush sprang up which had to be cleared away if honest trade or the people were to survive. Cleared

away it was by some early statutes. The true spirit of liberty conceived them but for the sole purpose of allowing ordinary private trade, like the trusts, to compete *ad libitum*. The king was prohibited from granting monopolies. No private person was prohibited from achieving them.

Before going into court, the trust lawyers thought such authority a precedent for their entire freedom to ghoul. They had started with the right to ghoul, if they could, and no man could show a bill of sale by which they had ever parted with it. Merging of companies was also allowed, and even provided for, by the corporation laws. Several rights did not, to their minds, sum up into a wrong. A statute using words which have a well defined meaning in the common law is deemed to use them in the same sense. It was not charged that any holding company was formed with the intention of securing a monopoly grant from any state or other sovereign power. As said by Mr. Chief Justice White in *Standard Oil against United States* (221 U. S. 1, 51): "Monopolies were defined by Lord Coke as follows:

" 'A monopoly is an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be

restrained of any freedom or liberty that they had before, or hindered in their lawful trade (3 Inst. 181, c. 85).'

"Hawkins thus defined them:

" 'A monopoly is an allowance by the king to a particular person or persons of the sole buying, selling, making, working, or using of anything whereby the subject in general is restrained from the freedom of manufacturing or trading which he had before (Hawk. P. C. bk. 1, c. 29).' "

As to whether individuals at common law were forbidden to achieve monopoly Mr. Chief Justice White in the same opinion says:

"It is remarkable that nowhere at common law can there be found a prohibition against the creation of monopoly by an individual. This would seem to manifest, either consciously or intuitively, a profound conception as to the inevitable operation of economic forces and the equipoise or balance in favor of the protection of the rights of individuals which resulted. That is to say, as it was deemed that monopoly in the concrete could only arise from an act of sovereign power, and, such sovereign power being restrained, prohibitions as to individuals were directed, not against the creation of monopoly, but were only applied to such acts in relation to particular subjects as to which it was deemed, if not restrained, some of the consequences of monopoly might result. After all, this was but

an instinctive recognition of the truisms that the course of trade could not be made free by obstructing it, and that an individual's right to trade could not be protected by destroying such right" (pp. 55-6).

Yet it is also a truism that all government obstructs everybody's liberty some in order that *all* may have the greatest amount of liberty which is consistent with *equal* liberty for all. Only thus can the weak be protected against oppression by the strong. This trite lesson has been learned in some fields, but it has yet to be learned in the business field. Perhaps its learning has been delayed because the courts in the later cases fixed their attention on "trade" instead of keeping it on liberty as did the early precedents.

Of these "acts in relation to particular subjects as to which it was deemed, if not restrained, some of the consequences of monopoly might result" the chief were contracts in restraint of trade. As stated by Mr. Chief Justice White, then Mr. Justice White, in the *Trans-Missouri* case:

"The rudiments of the doctrine of contracts in restraint of trade are found in the common law at a very early date. The first case on the subject is reported in 6 Year Book 5, 2 Hen. V, and is known as *Dier's case*. That was an action of damages upon a bond conditioned that the defendant should not practise his trade as a dyer at a par-

ticular place during a limited period, and it was held that the contract was illegal. The principle upon which this case was decided was not described as one forbidding contracts in restraint of trade, but was stated to be one by which contracts restricting the liberty of the subject were forbidden. The doctrine declared in that case was applied in subsequent cases in England prior to the case of *Mitchel v. Reynolds*, decided in 1711, and reported in 1 P. Wms. 181. There the distinction between general restraints and partial restraints was first definitely formulated, and it was held that a contract creating a partial restraint was valid and one creating a general restraint was not. The theory of partial and general restraints established by that case was followed in many decided cases in England, not, however, without the correctness of the difference between the two being in some instances denied and in others questioned, until the matter was finally set at rest by the House of Lords in *Nordenfelt v. The Maxim Nordenfelt Guns and Ammunition Co.*, reported in (1894) App. Cas. 535. In that case it was held that the distinction between partial and general restraint was an incorrect criterion, but that whether a contract was invalid because in restraint of trade must depend upon whether, on considering all the circumstances, the contract was found to be reasonable or unreason-

able. If reasonable, it was not a contract in restraint of trade, and if unreasonable it was.

"The decisions of the American courts substantially conform to both the development and ultimate results of the English cases" (pp. 346-7).

Thus the trust lawyers believed it impossible for the court to hold that their clients were a monopoly and equally impossible to hold that they restrained trade unless they did so unreasonably. They were themselves confident that their conduct had been not only reasonable but compulsory, as under the conditions it was the only course open to them under the rule of self-preservation and had been both permitted and compelled by Caveat Emptor.

Yet in the Trans-Missouri case the court held that all contracts and combinations even in indirect restraint of trade were contrary to the statute whether the restraint was reasonable or not. This holding was contrary to the proper common law interpretation of the Sherman act and contrary to any proper interpretation without overruling Caveat Emptor. That the justices did not pretend to do as the briefs gave no indication that the litigation pertained to the law of sales. Like the policeman they held that Caveat Emptor was right and it was right to follow her but wrong to overtake her! This result was unconsciously forced by public opinion. The judges, like the people, knew something was wrong but to them just what was no more clear.

While the right was there and the wrong evident, it was perfectly apparent that according to the law the wrong was right. Therefore something stronghanded had to be done. Done it was after Caveat Emptor's own fashion and right worthily of her first judicial friend. More human crisscrossing was accordingly indulged in and another concatenation of contradiction introduced into the law.

In the Trans-Missouri case Mr. Justice Peckham for the Supreme Court said:

"In business or trading combinations they (the results of trusts) may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption of control over one commodity by an all-powerful combination of capital." After noting that change from stage coaches and canal boats to railroads, and from hand labor to machinery, meant ruin,—unfortunate but necessary,—to some the court continues:

“It is wholly different, however, when such changes are effected by combinations of capital, whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold, the effect being to drive out of business all the small dealers in the commodity and to render the public subject to the decision of the combination as to what price shall be paid for the article. In this light it is not material that the price of an article may be lowered. It is in the power of the combination to raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others. Nor is it for the substantial interests of the coun-

try that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital. Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the purpose of restraining trade or commerce" (pp. 323-4).

And the Addyston Pipe case was decided within the principle of the decision in the Trans-Missouri case (*Addyston Pipe & Steel Company v. United States*, 175 U. S. 211).

The danger to the public led the court to disregard mere rules of statutory construction in looking for what it believed the public needed. Congress, it was assumed, intended to benefit the public and therefore supplied that need even if it did not so state or stated the contrary. The holding company was not itself in restraint of trade. It was only a means at best. Not what it was but what it did, effected results. While it would appear reasonable to punish as misdemeanants, as provided in the act, those who by means of a holding company effected a restraint of trade, this would seem to give no warrant to dissolve the holding company. The authority to restrain, given in the act, is only "to prevent and restrain violations of this act," not holding companies. While self-supposedly striking down a great public evil such considerations did not weigh. But it soon appeared that the great

public evil had not only not been struck down but had not been struck.

Monopolies and holding companies continued in business at the old stand. In construing the statute to include "every" contract and combination in restraint of trade or commerce the court had made it possible of enforcement only by stopping all trade and commerce. Two peanut venders who wished to unite their stands were as much within the act as the largest corporations. The appalling consequences of complete enforcement resulted in complete non-enforcement, for all practical purposes, from 1896 to 1911, when the Standard Oil and Tobacco cases were decided by the Supreme Court (*Standard Oil Company of New Jersey v. United States*, 221 U. S. 1; *United States v. American Tobacco Company*, 221 U. S. 106).

When monopoly had thus further flourished for fifteen years more, until all the land cried out with the pain and shame of it, public opinion—again unconsciously in the judges' minds—forced a new ruling. A remedy was most urgently needed. The failure of Congress to supply any in twenty-one years, seemed to make it necessary for the court to try again. It was generally recognized that while in the period of non-enforcement many had offended, some had offended enormously. These powerful, flagrant offenders were much condemned. Naturally there was the greatest general desire to bring them within

the law. The puzzle which had gone unsolved so long—and is still unsolved by Congress—was how to bring them within it and leave out general business, which was equally offending on a lesser scale.

The immediate problem was solved by the court by evolving a new, yet an old, rule. The *Trans-Missouri* case was not expressly overruled. It was "limited and qualified." In the *Tobacco* case syllabus it is said: "The Anti-trust Act must have a reasonable construction as there can scarcely be any agreement or contract among business men that does not directly or indirectly affect and possibly restrain commerce" (p. 107). Mr. Chief Justice White wrote for the court that "the duty to interpret which inevitably arose from the general character of the term restraint of trade required that the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect" (p. 180). In order to stop the big offenders without stopping trade and commerce,—in order to hit the big offenders and let the little fellows go,—the "rule of reason" was evolved. This is but that course of the common law which has been often its strength and sometimes its weakness. It is always its weakness when a better is at hand. It is but the infant's

method of creeping in order to learn to walk. Decisions are picked out to do justice in individual cases until an underlying principle can be discerned. A general rule is then framed which can be known in advance. Until such a principle is discerned and a general rule framed no one can know in advance whether what he does or is about to do will conflict with the court's idea of justice.

It is only to that infantile, creeping stage that the Supreme Court's "rule of reason" has developed the law of monopoly. No one now knows or can know, after the most expert legal advice, how the court will decide any case until the case has been decided. Consequently no one knows what to do, or how to act, in order to avoid its possible condemnation. At this stage of progress in an age when business had considered itself far advanced on the road of civilization, it seems that it must again put on swaddling clothes and get down on its hands and knees while the Supreme Court is finding out what is good for it. Even the simple remedies of old wives are not to be applied. Such might not meet the "rule of reason." Long and laborious examination and investigation of every childish disorder must precede the application of a remedy for fear of a mistake. The child's life is so precious—and danger to others from over-rapid development so great—its growth must await the discovery, by litigation, of nature's method.

While this method of the common law is best when no other offers, its slowness makes it inexpedient when a better is known or can be discovered by legislators or philosophers. Our legislatures and Congress itself sit for the express purpose, where possible, of avoiding the long delay of evolution by common law. Legislators are elected to frame statutes. Statutes are enacted that rules of action may be known in advance. In the Sherman act we have a statute twenty-seven years old with its rule still unknown. Age-long development "at the common law" is good but vision is better.

The Supreme Court believing—owing to Congress' sterility upon the subject for twenty-one years—no other remedy possible, applied the one it knew best. It doubtless then seemed the only one for it to apply in order that the experimental concoction of some relief might at least be begun even if no cure should ever be discovered. The Supreme Court is greatly handicapped as a law laboratory, as it can deal only with contested cases put before it. It may have vision and not be able to use it, while Congress can always use all the vision it has.

In the Standard Oil case Mr. Chief Justice White wrote for the court: "And as the contracts or acts embraced in the provision (section 1 of the Sherman act) were not expressly defined, since the enumeration addressed itself simply to classes of

acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

“And a consideration of the text of the second section serves to establish that it was intended to supplement the first and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded” (p. 60). In other words, the Supreme Court will exercise its judgment on each case as it arises. It will decide

whether the individual trust is "good" or "bad." This amount of discretion, necessarily exercised *ex post facto*, it was at first thought would hardly do in criminal cases. Consequently, it was then believed, monopoly crimes must go unpunished—and the people unprotected—until the nature of such crime could be ascertained by suits in equity. "To inject into the act the question of whether an agreement or combination is *reasonable* or *unreasonable* would render the act as a criminal or penal statute indefinite and uncertain, and hence, to that extent, utterly nugatory and void, and would practically amount to a repeal of that part of the act" (Mr. Justice Harlan's opinion in *Standard Oil v. United States*, p. 97, quoting report of Senate Judiciary Committee).

Yet the Supreme Court has since taken the plunge as to crime as well (*Nash v. United States*, 229 U. S. 373). It has held that whether an act is reasonable or unreasonable is merely a matter of degree and so within the proper province of a jury to determine. It may well be doubted, however, whether it was not the Sherman act's disconnection with the mischief, rather than "reasonable or unreasonable," that made it seem to most indefinite and uncertain. Though the court has now held the act constitutional, as pertaining to crime, so far when proper appeal has been taken good reasons have been found to prevent any one from be-

ing very severely punished under it as a criminal (*Patterson v. United States*, 222 Fed. R. 599).

The second section includes within its purview: "Every person who shall monopolize, or *attempt* to monopolize," * * *. Construing monopoly, not as a grant from sovereign power, but as power itself, doubtless every business man *attempts* to monopolize, however feebly. In order to use that construction and prevent that inclusion the learned Chief Justice proceeded to apply the same rule as before: "Undoubtedly, the words 'to monopolize' and 'monopolize' as used in the section reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach

the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section. And, of course, when the second section is thus harmonized with and made as it was intended to be the complement of the first, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act and thus the public policy which its restrictions were obviously enacted to subserve. And it is worthy of observation, as we have previously remarked concerning the common law, that although the statute by the comprehensiveness of the enumerations embodied in both the first and second sections makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete it indicates a consciousness that the freedom of the individual right to contract when not unduly or improperly exercised was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract

was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words that freedom to contract was the essence of freedom from undue restraint on the right to contract" (pp. 61-2).

The court "limited" and in effect overruled the *Trans-Missouri* case on the ground that its carefully matured statements were mere dicta and irrelevant expressions of the personal opinion of the justices. It then, upon other like dicta and similarly irrelevant expressions of other judges, held that monopoly meant the same thing as restraint of trade. While this process seemed to the court forced upon it, it was not "law" as law was understood by the old lawyers. By this process any precedent can be made to mean anything or nothing, as cases upon exactly identical facts almost never arise. Whether the court exercised the highest wisdom in thus attempting to supply the deficiency of Congress may be questioned. Perhaps Congress would have thought out the proper remedy had it had to do so or "bust the country." Trouble enough was made by a court upon a former occasion when it took over Parliament's job by supplying *Caveat Emptor*.

The court started on the road to make trade free by taking to itself the power to strike down con-

tracts "having a monopolistic tendency." Just what contracts have that "tendency" remains to be determined under the "rule of reason." Of course, as at the common law, the court can go on applying justice, as it sees it, only to each individual case as it arises. This makes the process very slow. Contracts in cases which are hard for the public, in the court's opinion, will easily seem monopolistic, others non-monopolistic. "Bad" and "good" trusts will thus be distinguished one from the other. Meanwhile, no one knows the "bad" from the "good."

In its brief in the Tobacco case the government seemed to feel that the act could not reasonably apply to a single person who might by his own normal but honest and successful efforts, without combination of any kind, secure a monopoly by well-doing and economy. Yet the construction it was broadly contending for would include him. Accordingly as an exception to baneful monopoly it yielded monopoly "occurring as an incident to the orderly growth and development" of a single business (p. 117). This concession was not adopted by the court and, if it cannot be said that the court rejected it, it can be said that the court writes that the act prohibits monopolization "although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section" (p. 61).

Whether such a beneficial monopoly would be held

by the court to restrain trade must be left in the present state of its rulings to await the "rule of reason" "at the common law." A combination monopolistically doing something to restrain trade would now be broken up under the Sherman law. Yet it might, conceivably, be producing most efficiently. Its efficiency is destroyed by the Sherman act but will be preserved by civilized commercialism. In the Tobacco case the court thus assumed to clarify: "The obscurity and resulting uncertainty however, is now but an abstraction because it has been removed by the consideration which we have given quite recently to the construction of the Anti-trust Act in the *Standard Oil Case*. In that case it was held, without departing from any previous decision of the court that as the statute had not defined the words restraint of trade, it became necessary to construe those words, a duty which could only be discharged by a resort to reason" (pp. 178-9). Yet the same learned chief justice who wrote the foregoing also wrote as an associate justice in the Northern Securities Case (193 U. S. 197), the following, referring to the defendant's contentions in the Trans-Missouri case, one of which was that the agreement there involved did not unreasonably restrain interstate commerce: "Both these contentions were decided against the association, the court holding that the Anti-trust Act did embrace interstate carriage by railroad corpora-

tions, and as that act prohibited *any* contract in restraint of interstate commerce, *it hence embraced all contracts of that character, whether they were reasonable or unreasonable.*"

Mr. Chief Justice White further states with some vigor in the Tobacco case that the court has not inserted "unreasonable" in the act. It has not; it has merely held that the word was always there. In holding that restraint means only undue restraint where the Trans-Missouri case held that restraint meant all restraint, an opposite effect has been arrived at. This was not by insertion but it was by a distinction from insertion without a difference. We have said that the method of the court is but the method of the common law. It also so appears to the Inter-State Commerce Committee of the United States Senate. In a report to that body on February 27, 1913, the committee said:

"The committee has full confidence in the integrity, intelligence, and patriotism of the Supreme Court of the United States, but it is unwilling to repose in that court, or any other court, the vast and undefined powers which it must exercise in the administration of the statutes under the rule which it has promulgated. It substitutes the court in the place of Congress, for whenever the rule is invoked the court does not administer the law, but makes the law. If it continues in force the Federal courts will,

so far as restraint of trade is concerned, make a common law for the United States, just as the English courts have made a common law for England.

“The people of this country will not permit the courts to declare a policy for them with respect to this subject. If we do not promptly exercise our legislative power the courts will suffer immeasurable injury in the loss of that respect and confidence so essential to their usefulness. It is inconceivable that in a country that is governed by a written Constitution and statute law the courts can be permitted to test each restraint of trade by the economic standard which the individual members of the court may happen to approve.”

Restraint of trade as limited and defined by the Supreme Court “at the common law” takes on an added humorous aspect when it is recalled that the United States, apart from the states, has no common law. The Supreme Court has many times so decided. In construing a statute to mean what it does not say and then interpreting that meaning “at the common law” the court in effect assumes a common law jurisdiction which it has itself decided it never had. The weaving of this tangled web has been forced upon it by the false system of Caveat Emptor because no other relief, after twenty-one years of vain hope, seemed possible. The result, abnormal though obligatory,—from the court’s

standpoint,—brings other troubles. The court is forced to undertake solicitors' burdens,—as foreign to its proper function as cumbrous for business.

Dissolving combinations means approving or disapproving of reorganizations. The court is shouldered with the details of administration and the working out of new plans. None of this is the proper labor of a court. The procedure of reorganization must follow its legal process—slow, laborious and cumbersome—and mere business details become minutiae of a lawsuit. What business men should be able to do freely and quickly, under legal advice, becomes matter for lengthy adjudication. Though unnecessary it must continue to be both indispensable and expensive “at the common law” in default of civilized commercialism. True, the court now has the aid of the Federal Trade Commission. That is but an institution, however, so far as it brings business within the law, which does so by an instrumentality which is developed, legally, only to the stage of the Star Chamber of the Stuarts. Yet the element of secrecy in the commission is a fitting capstone of the absence of thought with which politicians, by the permission of business men, have beclouded the entire trust problem.

Before the Supreme Court reached its latest result the trust lawyers had fixed their gaze upon the accepted rules of what they considered our fixed legal system. The impartial human heart they did

not reckon on,—little realizing that, though it often does not know or will not accept the law, it always desires justice. Justice, as seen by the court, when meted out equally surprised both ghouls and ghouler-clerks. Monopolies were held equally barred whether created by the state or by that competition the early anti-monopoly statutes were passed to promote. Though many cobwebs were necessary to reach from the starting point to the landing place, however reasonably, it was done. The trusts then asked what was left to do: Break the law that could not be followed or “unscramble eggs”? This was the language of their creators. They believed the absence of a recipe for unscrambling conclusive for the first alternative. A law which could be followed and which would unscramble only rotten eggs no one suggested. No one suspected that some eggs were rotting to putrefaction and would eventually rot the rest. Everybody was aware putrefaction was rampant somewhere. The odor was terrific. No one traced it to the eggs, as they were not at the moment emitting gleams of dissolution. Some suspected a rat in the wall. Some said there was too much gold, some too little silver. One said “a System” and said the wrong system after he was out of it.

Meanwhile the great business acumen of trust magnates had long been exercised in sitting by their respective sewers watching the flooding of their vaults with dirty money. It was dirty because it

was the natural product of a barbaric system as unfair in its distribution as it was coarse and cruel. After one of these sewers was connected it ran itself; no further plumbing was necessary—only day labor and bookkeeping. Yet trust heads were credited with almost superhuman powers. The powers then exercised often would not have carried them into a state legislature or enabled them to run a shoe store. After tradition had so enwrapped one of these lay figures with mystery that he seemed a veritable Hermann of business, not to say sewerage or ghoulage, he would retire. It would then be found that the trust ran itself still better under a ready-letter writer from a bookkeeper's desk. Had it been tried it would possibly have been found to run better yet under a typewriter provided it was keyless.

The corruption wrought by Caveat Emptor in American life and politics has been incalculable. The trusts thought it only right to buy, if necessary, the privilege of being let alone while doing business the way every one else was doing it, only better. The purchasable thought it not wrong to take anything made by a trust provided it was money. They therefore took the money to help the trust make other people take the corpses. There they were economically sound, though morally crooked, because there was no money in the unproductive corpses. There never had been except for the trust. Born mismatched, made never to supply productive de-

mand,—worse than thrown away,—they are labor lost and wrong in the losing both laborers and corpse holders. Veritable spinster productions are they—born never to be mated with productive consumption—better never to have been born than only to putrefy in the open ways of trade and clog with decay and death the paths of commerce.

In a bad system good men ever do more wrong than bad men when the good men, though wrong, believe themselves right. Courage, unflagging zeal and resolution aid their wickedness and justify them in doing as much of it as possible. The strength of sincerity is theirs. What it is right to do it must be better to do well and best as much as possible. No squeamishness or soft-heartedness should ever hold one's hand from righteousness. Thus men of trusts with greatest piety were most relentless. Much did they wish their fellow citizens' respect. Arduously they sought it in church and Sunday school where they were taught, and taught, that what they did all the week was right. In very truth, ghoulings it was and nothing more although unrecognized—ghouling by natural law in a state of nature.

So unrecognized was it that sometimes ministers of the Gospel left the pulpit to go a-ghouling, having from afar observed the attractive hunting grounds. The adversary can as well from pulpits point out scenery as from elevated natural eminences. Thus the bad work went to worst, done by

the best. What wicked men refused to do from lack of fortitude, was often cheerfully performed by the pious from devotion to family and success in life. From the wicked they differed in avoiding remorse. Penitential tears could not flow over self-righteous deeds of gain for Lord and self, a partnership as well believed as foolishly founded in the light of equality and justice.

Remarkable as was this, these men's most astonishing belief, evidenced by their acts though not always by their words, was that religion had no business in business. Had the system been right, it would have been impossible for any one, even if disposed, to keep his religion out of his business. That religion could not get in proved the system wrong. The only way to make it right was to put religion in: the Fatherhood of God: the brotherhood of man: equal treatment, even in business, for brothers. Religion should have extended over life. Business as a part of life would then have been within religion.

Speculators have sometimes been condemned by these very men who denied religion to business. Yet speculators are useful because no one can always tell in advance just which corpses will revive. All know all will not. As to which corpses to jettison at once the judgment of speculators is best. That is why they are speculators, or at least those who have long survived. They know the stages of putre-

faction. Good speculators stay in business and save much for the future basic fund. The rest of the corpses are better thrown away sooner than later. There is at times doubt whether what seems to be corpse is really corpse. It may be dead, moribund or coming back. Speculators are useful and necessary diagnosticians. It is best to let them pass on the critical cases. They are the official salvors and sinkers. But every seller should not be a speculator. Society loses less by leaving these dangerous duties exclusively to hardy professionals. Their mistakes are fewer by far than those of inexperience and foolhardiness.

Speculators are skilled in balancing themselves on the tight rope between daring and caution. No one not born to walk that rope, or who cannot acquire the art quickly, should undertake it. He will gain excitement but lose money. Excitement enough for his actual needs can be had by watching the speculators' rope antics. They lose the fun the spectators get but gain excitement. The spectators miss excitement and save money. The speculators on the whole make money and save the spectators from losing it. Of course the spectators pay an admission fee. That is only fair. Civilized commercialism but makes free to every man his own. The speculator must make a profit on the corpses he resuscitates to make up for those he sinks. Usually it is a good one, but it is not nearly so much

as the spectators lose when they attempt to select their own corpses for resuscitation. Rather than do that it would be money in their pockets to stipend the speculators to sink all corpses on sight.

The speculators perform a most useful service so far as they deal, or attempt to deal, with economic corpses. Their dealings with the basic fund will under civilized commercialism be equally beneficial. They will not be able, even by monopolizing a commodity by purchase, to sell it again in the barbaric way. If they hold it unduly they will lose themselves. If they sell, they will sell to all alike. That will prevent, so far as possible, any one from buying corpses. Civilized commercialism will not cure bad judgment, but it will not put a premium on it, and increase it, as the present system does. Bad judgment will be minimized instead of magnified. Had the present system been expressly designed slowly to kill, at our present industrial stage, prosperity and civilization itself, human agency could hardly have improved upon it for the purpose. Civilized commercialism will encourage good judgment and help, instead of hinder, prosperity for all. At present greatest encouragement is given bad speculations. The system breeds them to excess. These bad speculations in economic corpses tend greatly to increase the number and severity of panics and hard times. The reason is obvious.

Wages are dependent on the basic fund. As that

decreases, the supply of money and demand remaining the same, the same wages purchase less. Wages do not go up as fast as the basic fund decreases. The cause has to operate before the effect. Labor has no way of getting any quick, or even slow, full relief. Wages in time go up some, but the decrease in the basic fund has made business poorer. The outlook is bad. The employer is dubious. These factors and others bear on the bargain between employer and workman and bear down on the price of wages. Even if wages finally went up to an even level with commodities, labor would lose the additional expense for commodities during the intervening time. With the decrease of the basic fund beyond a certain point labor cannot merely fail to receive proportionately increased wages but must also lose some jobs.

With the progress of monopoly through the industrial system the basic fund is at length so reduced that there is no longer a sale for the commodities of the employer. Corpses breed corpses by reducing demand. The rotting eggs rot other eggs. Even the worst piratical dumping,—here and abroad,—has no effect. The basic fund of the world is reduced just the same by injecting corpses into abroad; they react at once in lessening foreign trade and so increase home corpses. Foreigners have fewer exchangeable commodities with which to buy. Exporters soon have goods on their hands as corpses which,

except for those dumped corpses, they could have sold abroad to productive demand, i. e., demand for productive consumption. The employer announces that he cannot run full time, or pay full wages, as the demand for his goods has fallen off. According to him the market is bad. He has no idea he himself is bad—or a bad, barbaric commercialist. He lays the whole blame on an entirely innocent party, the market. The only trouble with the market is that he has not supplied the right things. He has gone on supplying only what he wanted to make,—not what the market wanted to take,—and too many of those undesired things.

The barbaric commercialist thinks he has a divine right to produce. The old idea of the divine right of kings to rule was not half so firmly fixed. The kings did at least know they were claiming a prerogative of the Almighty. The barbaric commercialist claims it without knowing it and without knowing what he is claiming. He thinks he is claiming only the right to live. “Cannot a man do business?” he asks. Yes, but not to the injury of other people. The present laws of nature must be changed before the present system can act without such injury.

A manufacturer, considered as a mouth, claims the right to gorge the stomach to colic and the intestines to appendicitis because he happens to like the taste of what he swallows. The colic and appendi-

citis are longer in affecting him but they finally reach even his nerves of sensation. He then, when it is too late, strains to reduce cost of production but only injuriously to push more corpses into circulation. He works hard, instead of thinking hard, and wonders why honest toil does not bring recompense,—ignorant that he is working against the universe. Among the first makeshifts is a reduction of wages and discharge of men. He cannot employ if he cannot produce; he cannot produce if he cannot sell. He wonders what the matter really is with the market, especially as so many people seem to be in need of things. Soon his own workmen and former workmen are among the neediest. They need food but cannot eat print cloth or ploughs.

They cannot buy the food they need because they have no money. Food is very high. It takes a good deal of money to get a little of it. There is not much effective demand for food but there is unlimited wishing for it. There is little effective demand for money. No one has anything to speak of that is exchangeable for it. Everybody, mostly, has only corpses. Our employer looks at his factory and machines—all at the moment corpse—and thinks that at any rate he still has all the property he ever had. As he can see his corpse but not his loss he goes on sitting up. Sometimes the corpse itself sits up again, takes nourishment—and emits more corpses.

These manufacturers, employers and sellers think

they are doing great things for the state by overplunging their markets. "Look at the country's output!" they say, as if the amount of food going into the stomach were a sure index of strength. The same man varies in strength according as he *productively* consumes his food. This idea was foreign to the founders of our trusts. They relied upon divine power productively to sell the goods (i. e., to productive consumption), although they knew little of goods, less of the natural laws regulating their sale and less still, and least of all, about divine power. We have since witnessed, recurrently, the natural result of their innocent barbaric folly.

Our employer works harder still but only adds more corpses. There is nothing else he can do now, as by this time that is all his factory has long been built to make. Times get worse but seem to be getting better in some ways because prices are higher.

In the pigmy and distorted land of barbaric commercialism, peopled chiefly by economic corpses, where trade harried—quickly compromising between lion and mouse—becomes a cat up a tree, it is fitting there should be ghosts among the ghouls. Unfortunately the ghosts are neither of ghouls nor corpses but of the only immortal thing in the whole land—money. While corpses-soon-to-be were selling well at high prices every one trusted every one else. The amount of money in the basic fund is always limited. Credit can be unlimited. Sellers were so anxious

to sell goods they did not require hard money. If they had they would not have worked off nearly as many commodities so soon to become corpses. They said to buyers: "Give us a note or a check and have your bank give you a bank credit for the amount as a loan and we will play that is real money." This was satisfactory to buyers as they then thought they wanted the soon-to-be corpses.

Probably they hoped to sell them again at a profit before their final gasp of exchangeability. They gladly gave ghostly paper for goods. This went on until there was a great amount of this paper in existence. The real money may have been haunted a hundred or a thousand times over. There really was not enough money to handle all the sales but the amount of ghostly aid did not at all represent the proper shortage. Most of the ghost sales should not have been made. They were only sales of to-be-corpses. These ghosts were nothing more or less than promises to pay money. Buyers had given paper promises, instead of the real thing, promising to get the money on demand or at a certain time.

On the morning our manufacturer was refused a loan at his bank the sudden surprise communicated through the commercial world, acting upon the conditions there existing, produced what is known as a panic or financial crisis. Everybody knew all the ghosts could not be laid at once. Everybody was afraid at the same time that he would not be able

to lay his own. He knew he would not unless he was among the first to start. He knew there would be no hard money left for him unless he got it then. He told all his debtors to pay up. They called theirs and, none of them having any hard money, most failed to pay and failed together. If they had anything exchangeable they were forced to sell at any price to keep from failing. When the panic cleared many such men were ruined, having only corpses and owing paper. The paper had become valueless—melted in mist, as most ghosts do when anything real comes their way. These ghosts melted for an opposite reason—so contradictory is this economic land—because no real money came their way.

Hard times, so called, ensued. These times of industrial depression are not called hard because hard money is easily procured. It is merely a time of creating a new basic fund by hard labor. Even sitting up with economic corpses is not easy work. The old basic fund has largely disappeared—into unproductive corpses—never to return. It is necessary to provide a new one before exchange can again be freely conducted; before money will again circulate rapidly; before prosperity will again have, so to speak, an old home week; and before every breast will be once more buoyant with confidence that in the new era of prosperity corpses will never again putrefy.

Yet under the present system of permitted search

for high trades prosperity must always be a most transient guest. Monopoly, now premiumized to produce as much as it can instead of only so much as it can sell to productive consumption, with constant repetition must tend, at present, by contributing an excessive supply of economic corpses, to reduce instead of increase the basic fund. In barbaric commercialism monopoly must thus again and again without cessation hasten business along the hard times highway. Even in the periods while it is increasing the basic fund, monopoly by its dangerous tendency to increase the relative share of the few is but forwarding the ancient process and forcing history to repeat itself.

In times of panic much is heard of over-extension of credit and lack of confidence. They are even erroneously given by some, along with over-speculation, as primary causes of hard times. Of course there would be no panic on a large scale without a lack of confidence and there would be no such lack of confidence if credit had not been extended far enough for some to worry about the ability of others to pay. But something besides the mere extension of credit has created a lack of confidence. The calling of debtors, though showing a lack of confidence in them, would not embarrass them, did they have wherewith to pay. It is not over-extension of credit that embarrasses them but lack of money. They would have the wherewith to pay if they still re-

tained that for which they became indebted and it retained its value and exchangeability. It would retain its exchangeability, and thus would have some value, were it still in the basic fund.

As many debtors have little or nothing of any value but have corpses, much has left the basic fund. Something besides over-extension of credit is necessary to put things out of the basic fund. Unproductive consumption or destruction are sufficient causes. Whatever has been productively and profitably consumed, is not only still in the basic fund, but of greater value than before, and therefore exchangeable for more money, barring fluctuation of that medium, than the amount of the indebtedness. Thus it is the failure to consume productively and profitably that has put a given commodity out of the basic fund, or reduced its value, and rendered the debtor unable to pay his indebtedness. Just what form that failure has taken is immaterial so far as his immediate ability to pay is concerned.

His inability to pay and consequent failure destroys property of his creditors and may indirectly destroy the property of many creditors. Wealth is singular, property plural. Wealth is an economic term, property a legal one. A carload of flour, exchangeable and productive, sells for, let us assume, \$1,000. It is resold a thousand times on credit at an advance, but it does not become 1,000 carloads of flour. It remains single. Property has, however,

been created to the extent of at least \$1,000,000. One thousand men without other capital hold the notes of a thousand others for \$1,000, and upwards each. Were this carload of flour turned into bread by the last man and sold for hard money at a higher price than he paid, he could pay his debt and each of the thousand in turn his own. But if the last man unproductively consumes the flour by turning it into unexchangeable cakes and fails, his failure will bankrupt all the rest, and turn to waste paper \$1,000,000 worth of property. The wealth of the country has then been diminished by one carload of flour.

The hard times that will ensue will not be proportioned merely to the loss of one, but more nearly to the loss of one thousand carloads. Surprise has been expressed even by economists at this observed fact, but the explanation is simple. Each of the thousand men (who had no other capital) has by hard labor to re-acquire \$1,000, or in some way again acquire credit, before he can again trade in carload lots of flour. In the meantime he is out of business, poor, and having a hard time. Each has lost at least \$1,000 so far as his power to exchange is concerned.

It was his power to exchange that enabled him as a trader to participate in prosperity, i. e., the increase of the basic fund. Each gave a carload of flour for a note which turned out worthless. The fact that it was the same carload changes no man's status. If

he had not taken that note, he *might* have productively consumed the flour himself or sold it for hard money. He gave a note for the carload but has now lost his credit. His power to exchange is gone. His credit was worth \$1,000 to him as power to exchange, for with it he acquired a carload of flour. Credit will not be restored to all. There is lack of confidence in it now. Some will be obliged to earn their next \$1,000 by hard labor. Such a time will confront many of the one thousand and for all such the times will be hard labor times. They will necessarily be hard for a much longer time than for all such unitedly to earn one carload.

Thus it is seen that the production of one economic corpse, working through conditions, has caused hard times for many, if not most. The community cannot avoid an indirect effect. The conditions were over-extension of credit and lack of confidence in it, well justified, but without justifying regarding them as primary causes instead of the corpse. Doubtless by the doctrine of chances a sufficient number of sales would find an unproductive consumer. Even so, over-speculation—however certain a means to the end—does not become the end, i. e., the corpse at the end. With economic corpses unproduced, times could never be rendered hard even by over-extension of credit, lack of confidence and over-speculation.

Unfounded panic might come and breed more panic. Part of the basic fund would be thus put tem-

porarily out of commission by changing opinion but would come quickly back. This damage could never create the great depressions of the present, as the impact of shadows is less destructive than the impact of reality from corpses which never come back. By that lesser impact, to the large extent civilized commercialism would contribute to lessen corpses, would civilized commercialism lessen panics and prevent hard times.

There can be over-extension of credit and lack of confidence, with subsequent panic, without subsequent hard times. Without corpses there cannot be hard times. After shadow panics all corpses would revive. After present panics some, if not most, corpses do not revive. Hence hard labor times—incomparably harder than watching corpses sure to revive.

The foregoing also enables us to view currency inflation in its proper secondary place. Inconvenient as inflation is to wage earners and persons with fixed incomes in raising their cost of living, its main effect in bringing crises and depressions is in its aid to speculation. Some mismatching is of course produced by cutting down the buying power of fixed incomes if production remains unchanged. Mismatching of production, for the most part, could be avoided if producers watched their markets sufficiently closely. This is therefore only one of the elements entering into the producer's survey and can

be better taken into account by small producers, each closely watching a small market, than by a large producer who gets but a bird's-eye-view of all. So far as inflation aids speculation, by constantly raising prices, it can be but a secondary cause of hard times, as speculation itself is only such.

Distinction must be made between hard times and poverty times. A nation or the world might gradually grow poor and remain so without industrial shocks and without recuperation. The economist's term for this is poverty times. Inflation might go far to bring this about, but it would not be by a series of industrial depressions. Such assumed radical and constant inflation would prevent industrial revival. Hence constant descent without ascent. Inflation, for its effect in helping to produce intermittent hard times, must be scanned more narrowly.

As intermittent hard times are chiefly caused by economic corpses and monopoly in the present stage of industry is a most prolific breeder of such, monopoly in barbaric commercialism is a great contributor to hard times. It follows that whatever lessens the evil of monopoly in this respect will tend to prevent hard times. The remedy for monopoly so far as it is evil, and only maleficent monopoly is evil, is presented in the next chapter. It consists of only three rules which together con-

stitute the code (as to selling) of civilized commercialism.

Perhaps the fortified reader will perceive in it something more than a code—a door of opportunity and an extension of democracy. If so, he will see the latter for the first time entering that field into which, though occupying six-sevenths of the life of most business men, they have never been able to drag their religion. Their difficulty seems to have been that they tried to pass it through the needle's eye of personal gain. The broad, open door of the brotherhood of man offers a wider aperture. Perhaps, after all, in time the fullest democracy will be found to be the most practical Christianity.

CHAPTER IV

BUSINESS IS JUSTICE AND JUSTICE IS BUSINESS

ALTHOUGH much law has been aimed at business, none has yet hit it. So far the law has succeeded in hitting only the agencies and integuments of business and thereby has succeeded only in needlessly clogging the channels of trade. Business needed regulating, not handicapping. Wrong diagnosis induced wrong treatment. Business itself consists only of buying and selling, not of a corporate shell. Business itself is still outside the law. In their buying and selling business men at present inhabit a barbaric land of anarchy all their own. Like the privileged classes of former times and other climes, they have never been brought, as buyers and sellers, beneath the benignant sway of equal law. The trusts have severely handicapped their small competitors and the remedies applied have merely proposed, in retaliation, to handicap the trusts. Law is not war. Legal science makes little progress by the method of that art.

The present evil the trusts inflict is great. But

the trusts at present inflict this evil, in general, simply by following on a large scale the same system which all are following—or can follow so far as the law is concerned. On the large scale the evil is more perceptible, but not in essence more unjust. When fair rules control all business men, no separate law will be needed for trusts. A scientific remedy will change the system but only to the extent necessary to remove the evil. The new system will not vainly attempt, though that has been the practice of the past, to devise a law to punish large malefactors and let little ones escape who are equally guilty but less successful in effecting damage. It will not remove large corporations merely because they are large, nor will it trouble even those which are monopolies so long as they are beneficent. None, large or small, will be allowed by the new system to be maleficent.

Original as this system will seem to some, it will be but a codification of the best present practices of our best commercialists. No new business customs will be invented by legislation. Barbarous commercial practices, merely, will be excluded. It can be scientifically reached by purging the death from the entire body of present commercial practices. This death consists of the practices of all bad commercialists and all bad practices of good commercialists. The body of this death, from which commercialism has long been crying to be delivered,

is but a body of barbarism lingering in civilization. Only three simple rules, which all business men can understand in advance, will be left to constitute the selling code of the new and civilized commercialism. When they are followed with fair success, the evil now inflicted upon competitors and the public by trusts and monopolies, as sellers, will end.

Selling has been over-long looked at only from the standpoint of the seller. Our law and our business, at present, have here an individualistic, not a social, outlook. The time has come to look at selling from the standpoint of all. All are buyers. It is true that in every sale there is a seller as well as a buyer, but in present-day business the sellers repeat more often. The interest of society as a whole should be placed before the interest of any part. Even sellers are buyers. Under a system of equal justice the equal freedom of all must be preferred to the privilege of some. A present commercial adjustment which is resulting in commercial privilege therefore needs readjustment. A system which is working inequality of opportunity needs to be readjusted until it works equality of opportunity. As only further inequality can be reached by further adjusting our commercial system in the interest of sellers, it is time to adjust it in the interest of buyers.

Equality of opportunity for buyers, rather than sellers, is also to be preferred for the reason that

all are buyers and only *some* are sellers. All do not buy the same things, but all buy something and some do not sell. Equality of opportunity is of such a nature, when it is given *all*, that in receiving it as buyers all will also receive it as sellers. Of this change present sellers will have no just complaint. They are entitled to live, in a free country, only under a system which gives equality of opportunity to all. Those, if any, who may lose more as sellers than they will gain as buyers and as citizens, by the change, will lose only what they are now, by privilege, subtracting from the common good. The present system attempts to reach equality of opportunity by in theory giving all, as sellers, an equal opportunity to prey. The opportunity, for most, is barren because its philosophical basis is false. All cannot long prey successfully upon each other though the law permit.

The only equality of opportunity the law can permanently maintain for all is that which is afforded by equality of protection from oppression. To that all are entitled and all can be by law both successfully, and equally, protected. In considering the law from the standpoint of protection for all it is also necessary, for the same reason equal opportunity for buyers rather than sellers is to be preferred, to consider it from the buying rather than the selling standpoint. That reason is that *all* buy and only *some* sell. The present system of com-

mercial privilege has been reached only by making the law the sword of some instead of, as it should be, the shield of all. It was reached by the accident of power, not through the preachment of philosophy, but injustice unconsciously reached is none the less unjust. Where some good reason cannot be shown to the contrary, the public, i. e., society as a whole, in addition to equality of opportunity is entitled, as well, to the highest producing efficiency, i. e., the best goods at the lowest prices.

To the great majority of our people equality of economic opportunity is not now open. The chief reason is that the present system of buying and selling benefits sellers at the expense of buyers. The present system has allowed monopoly to raise prices over the country and reduce them below cost in some small town to kill off a competitor there or keep him from getting a start. The small competitor has thus lacked an equal opportunity. But it has only been possible for the trust to destroy him unfairly because it has been free to close equality of economic opportunity to buyers over the rest of the country. They were denied the opportunity to buy on equal terms with those in the small town. Buyers in the country at large have thus paid, unjustly, the cost of unjustly crushing competition and supinely allowed an evil system to continue which works against themselves to their own great loss, both present and future.

The trust could not have eliminated its small competitor, but had it tried to do so would have bled to death at every pore, had he been more efficient in his small town than the trust was anywhere,—*if it had been obliged to reduce prices generally in order to reduce them there.* The present system has thus worked, unseen by most, for sellers. Justice requires that the system be now so shaped that buyers will no longer receive that inequality which is injustice. The maxim "Business is business" means nothing unless it means that business is injustice. It was only by thus disguising even from themselves their operating principle that business men have so long kept themselves, let alone the public, from seeing that business need not be injustice. For buyers,—for *all*,—a different maxim is now due. The proper maxim for business can and should be: Business is justice and justice is business. It is the injustice at present received by buyers in the first instance that now allows further injustice, first, to the small competitor and later in monopoly prices to the entire public.

The modern and peculiar evil of trusts and monopolies, so far as the public and competitors are concerned, comes from discrimination. They work their injuries, not because they are large corporations, but because to equal citizens they largely offer only inequality. They destroy competitors and oppress the public by unfair discrimination in prices.

With the object of abolishing monopoly, restraint of trade was first prohibited. But just what the specific acts were that necessarily restrained trade was not then understood. The combining of corporations was erroneously believed to be among them. Hence the Sherman law. Later, unfair competition was seen as the true source of restraint of trade, but it is not yet seen sufficiently clearly to prevent the proposal of erroneous remedies.

To remove the cause of the evil it is unscientific to attempt, as has been done without success in the past and will be attempted with like futility in the future, completely to catalogue the things that should not be done. The things that should be done by trusts and monopolies, as sellers, in order to treat the entire public and all competitors fairly, are plain. They fall under three heads and are covered by three short rules of action. By providing that these three things shall be done it becomes unnecessary, in the framing of laws, to worry further about what shall not be done. All the things that anybody has ever wished to prohibit the trusts from doing, from their original combining to their secret espionage upon competitors, are things which would not enable the trusts, as sellers, to injure competitors or the public, if the three penal rules of the new commercialism were obeyed.

Evils which trust officers now commit as common or garden criminals are not, strictly speaking, the

evils of sellers. Such are neither modern nor peculiar and need no new penal law. Hiring some one to drive tenpenny nails into a rival's cash registers, as well as employing a firebug to burn a competitor's warehouses, needs only stringent enforcement of existing, old-fashioned criminal law. The part of the present trust evil which is modern and peculiar is a different thing. It has arisen because our legal system has not kept pace with our economic progress. To show how to bring it into line therewith,—with some of the reasons therefor,—not to present a panacea for crime, is the purpose of this book.

Internal corporate as well as many other needed reforms also belong to other departments and need not be dealt with here. The three rules of action referred to, which should apply to all alike, are these golden rules of selling:

1. *Each seller must treat all his customers alike by selling the same grade of the same thing to all, who buy at the same time, at the same price plus freight, if any.* To be effective this rule must not hinge upon intent or unprovable "effect." Competition between sellers is left free. The only thing imposed is equal justice to all his customers by each seller. Prices can be changed by any seller at any time if changed for all. This rule will not prevent sellers from maintaining wholesale and retail departments provided customers of each department,

as between themselves and at any particular time, receive equal treatment. For sellers with more than one local cost,—where the local cost is distinct from general cost, as it may be, for instance, in the case of chain-stores,—“freight” will be construed to include local cost as well as carriers’ charges. This will allow chain and other sellers the full advantage of any economy in buying or producing upon a large scale. The public interest requires this. But a small dealer will be able to remain in business in any small town, so far as competition with chain-stores is concerned, provided he can beat the store chained in his town. The public interest requires this also.

The chain will not then be able, by selling below cost in that town alone and more than making up the loss in other towns, to drive out of business a more efficient server of the public than itself in his town. This is also required by the public interest and by fair competition. The opposite rule means in the end, as a general proposition, higher prices for the public. In any event it means waste because it allows the mere power of money, in spite of economic inefficiency, to establish a monopoly at the public expense both in the sacrifice of more efficient dealers and the resulting greater expense to society in the performance of the service. It also means waste even if monopoly—contrary to usual monopoly practice—imposes no price which allows more than a fair profit above its more expensive service-cost.

2. *Different grades of the same thing, or different things, if sold by the same seller at the same time, must be sold at prices reasonably similarly proportionate, commercially, to their respective values.* This means commercially (not arithmetically) from the standpoint of any seller in question, not the standpoint of some other seller or the general market. This second rule is but the principle of the first applied to the wider field.

3. *Each seller while selling must allow all, who wish, to be his customers for cash. Leasing, or any other subterfuge, will be regarded as selling, within the meaning of these rules, when done in the business of distributing commodities.* The rules apply only to those in the business of selling. Any seller is at full liberty to sell his entire stock to the first customer who comes along, or refuse to sell to any if he refuses all. The third rule will then have no application to this particular seller, as he will then be, temporarily at least, out of business. This rule means, merely, that each seller must sell to all while he sells to any, provided cash is offered. This third rule is necessary in order to place the entire selling field under the other two.

This simple three-rule code is framed from the standpoint of the interest of society as a whole. If there are now more sellers than society needs as agents of distribution the situation, from the standpoint of society as a whole, is uneconomic and waste-

ful. Yet at present, even if such is the situation, society has no way to remove the excess and at the same time remove the least efficient. In the new commercialism such removal will be largely automatic. By the social outlook is thus meant the interest of society viewed as a whole. The body politic is regarded as a unit and not as composed of many units, all rightfully entitled to wage war upon each other. Only as man has ceased working the latter hypothesis has he crawled from the night of savagery toward the growing light of civilization. It is possible for an excessive number of sellers to live today because, owing to the ignorance of some of their customers, they are able to charge them higher prices than they would be able to obtain in the new or civilized commercialism. The present system allows this and our present law thus has an individual outlook.

The difference is that between the faithful shepherd dog who watches the flock for the benefit of the sheep and the wolf who also watches but only for the benefit of himself. One watches only to protect, the other only to plunder.

A system can be entirely in the interest of wolves or partly in the interest of sheep. To have the latter, it is not necessary to disregard the proper interest of wolves. The present system disregards too much the proper interest of the sheep. Any system is wrong which allows its law to work for the indi-

vidual at the expense of society as a whole, because the law is then merely the weapon of a few in an assault upon the many instead of, as every law of society should be, the shield of all. No man can rightfully make the law his private property, and when he has done so no wrong will be done him by taking it away. Without recompense he will justly lose his unequal and therefore unjust advantage. The reason is that, so far as laws are concerned, he was never entitled to more than an equality of opportunity. No system of law is possible by which all can prey upon each other with equal success but all can be by law successfully and equally protected from each other.

When a store must give one price to all it is obliged to fix a price low enough to attract customers who know the value of the goods. Otherwise some other store will attract them. Advantage will not then, as sometimes now, be taken of the others who do not know the goods. The social service here and the mutuality of help which are necessary to the advance of civilization, are obvious. Such a rule thus has the social outlook. Under it all buyers from a certain seller receive the benefit of their combined knowledge. In receiving this, no buyer can receive more than all present sellers try to make each customer believe he is receiving, viz.: The best goods at the lowest prices. Thus by a benign system some,

at least, of the malignity of Caveat Emptor is at last removed from trade.

In civilized commercialism buyers will help each other instead of only affording an opportunity, as now, for wolves to help themselves. No store can afford, in the new commercialism, to sell or try to sell only to those inexperienced in values. In the first place it will desire large sales, and in the second place it will not desire that bad reputation which it will in a short time receive, if it becomes known, as it soon will if such is the case, that no experienced buyers patronize the store.

In the new commercialism it will not be possible, as it is now, for sellers to exist in small oases fertilized chiefly by the ignorance of their customers. All will survive only by efficiency in service, and all will reach the exact size such efficiency deserves. This will eliminate any who are not now efficient servers, however great their efficiency for self. Some sellers are probably now existing by charging a few customers who are not good bargainers over-high prices. Such sellers, under a one-price system, would have to choose between selling only to those customers or also to the others. If they chose the former they would soon be found out. If the latter the former would receive a benefit now unjustly, because unequally, denied. In either case the most efficient seller, i. e., server of society, could be easily determined by any instead of, as often now, effect-

ally concealed from all. Custom will then automatically gravitate, gradually at least, to the most effective server because he will be the lowest seller. This natural process of gravitation will no longer be prevented by the inequality of sellers in price duplicity.

To that extent the elimination of surplus servers will be automatic. Sellers will then survive only by efficiency in service and no longer by efficiency in deception as to prices. Service for society, not service for self with the foul club *Caveat Emptor*, will win. Society will thus be the gainer and there will be a tendency to focus attention upon quality, as beneficial as welcome, as the lowest price will be easily ascertained and the customer's chief attention can then be given to the essential instead of the unnecessary. Yet if any monopoly now exists by service it will not be disturbed. Let us glance for a moment at the position of ideal sellers in an ideal society. Evidently each would supply just that space around him, or that custom, which he could supply most efficiently,—that is, at a less price than any one else could supply it. Dealers supplying such custom would not be duplicated. Society would have exactly the necessary number of service agents and no more.

Evidently the present system is far from these conditions. It has no automatic method of approximating them. It allows a seller to exist in affluence, even if he is inefficient in service, provided he can

fool sufficient of his public by individual bargaining. It is the present barbaric commercialist, not the new commercialist, who prevents the perfect working of the law of supply and demand. Political economy presupposes that the entire supply will impinge against the entire demand at a given time and find a natural equilibrium in a market price. The barbaric commercialist constantly tries to elude this law as best he can by individual haggling. For the straight line of the square deal he substitutes the uneven break of injustice. Being an expert haggler, he is bound to get the better of some of the inexpert members of society and can then afford even to distribute favors among the expert. Were the seller bound to make a one-price at any one time to all his customers, society would receive the benefit of collective bargaining because that price would be intended to appeal to the expert. The seller's self-interest would prevent him from appealing otherwise.

Society would thus automatically achieve by a simple rule the great boon which the laboring man through long years of strife has sought to reach through union. Coöperation would be introduced into society in its bargaining. The law of supply and demand would then be working perfectly, from the buyers' standpoint, as the seller and society would be the two bargainers and upon an equal basis. Collective bargaining is as necessary to pro-

tect society in its buying as it is to protect the laboring man in the sale of his labor. Civilization has progressed only by the practical application of co-operation. Civilization is coöperation. It is only by continuing to make such practical applications that civilization can continue to progress. Society should no longer, as individual units, leave itself at the mercy of the seller. The time has arrived for society to impose the rule which will liberate for society's benefit the great force already inherent in its own union. The great evil of monopoly which, in the absence of a remedy, has now grown up requires this, and the enormous force which will be a sufficient remedy is waiting only for the proper practical application of coöperation.

The present barbaric commercialism allows a seller to be a monopolist, however inefficient in service, provided he has sufficient capital to kill off competition. In civilized commercialism a monopolist will be able to exist only by being a blessing to society. Only when he can supply the entire country at a less price than any one else can anywhere produce will he remain a monopolist. But whoever can at any time do so will automatically become what is now unknown—a *blessed* monopolist. At the same time, any little fellow anywhere will have full opportunity to compete on equal terms in his own small town. He will supply his town provided he can

supply it more efficiently than the trust or the country will gain more than he will lose. The larger the territory the trust is supplying, the more quickly will it bleed itself to death, obviously, if it reduces its price over the entire country sufficiently to kill off a little fellow more efficient than itself.

Only under rules thus framed from the social standpoint can the little fellow have any economic equality of opportunity, but he will have such an opportunity under rules framed in the interest of society as a whole. Such rules do not spell socialism. Government will not, any more than now, own the means of production or parcel out jobs and wages. Every individual, as now, will work for himself upon his own initiative. There will be coöperation, but it will be only that kind of coöperation, under a government of laws and not of men, which means the greatest individual freedom consistent with a like freedom for all individuals. No other coöperation is worthy of true civilization and true civilization deserves, and can be achieved with, no less.

The only difference, distinguishing the new commercialism from the old, will be that all will be working under rules which will compel each individual, in order to work for himself, to work for society as well instead of allowing him, as now, to work against society and only for himself. Now, as will not happen then, success often comes most largely by following the latter course. This is

monopoly's chief present method of winning, notwithstanding that learned professors write of what enlightened monopoly might do. In civilized commercialism every monopoly will be compelled by self-interest to act as the professors would now have it act by enlightenment. To carry this great enlightenment where it is most needed it is only necessary to change the rules of business to fit the interest of all the people. The shortest cut to socialism is to continue rules framed, as in present conditions the present rules are framed, in favor of the few. Much better will it be, by adopting the new commercialism, to allow business to make a basic and practical application of the old Golden Rule.

The system introduced by the new rules should proceed upon the basis of personal guilt only. Corporations should be exempted because it is the only way innocent stockholders can escape being unjustly mulcted. All persons authorizing, aiding or abetting in any way, on the part of the seller, any violation of these rules, directly or indirectly, should be personally punished, and no corporation should be allowed to stand the consequences so far as they may be financial. Corporations will commit no crimes when men refrain from committing them. Sellers will be brought by these rules, however late, from the realm of anarchy where they have always traded, and they will be placed, at last, beneath the sway of equal law where they always belonged.

Democracy will then have been introduced into business. The securing of equal rights for all men by equal laws has been progressive. In making bad business crime civilized commercialism does only what English law has always done to any evil it considered deserving of elimination. Unfair monopoly by all parties has long been so pronounced. Judgment has been entered but sentence is yet unexecuted.

Clerics were at one time outside the jurisdiction of English criminal law. Clerics at that time included all who could read and write, and no educated man then considered that he belonged beneath the jury system. He desired to be judged, and under the system then prevailing he was judged, by friendly canonical courts. The penalties meted out by clerics to clerics for injuries inflicted upon common men came to be extremely light, and in time the privilege of the literate to run amuck had to be taken away by common men at the behest of the common good. Business in our day is still running amuck, and the natural method of taking its privileges away in the interest of the common good, following the spirit, traditions and prior course of English law, has not been plain to some. Hence the strange mixture in the remedies proposed.

Internal corporate reforms, prohibition of holding companies and interlocking directors, regulation of stock exchanges, improvements in railroad laws,

powers of trade investigation and modifications of banking systems, are often included in one unclassified and unclassifiable mass as a proposed bill for the regulation or extirpation of that private monopoly which, in its chief present essence, is the exercise of privilege in selling. The wonder is not that some consider such laws inapplicable to labor unions, but that any consider them applicable to anything.

Up to the present we have had unnecessary destruction instead of necessary construction. Congress now has its monopoly legislation labeled "anti-trust acts." Civilized commercialism will not be "anti" anything. It will all be *for* the public.

To draw a proper penal law it was first necessary to diagnose the basic mischief. It was the system that was wrong. Sellers were not wrong personally. A wrong but permitted system could not be corrected by punishing the personally good who followed it most successfully. When all businesses were small, rules of competition were unnecessary. When some became large, the need of rules was unseen. But the oppression permitted by their absence was plain. Yet the evil system was unsuspected. Instead of itself progressing to fit the new conditions, retrogression of the large was attempted by our law. Instead of rules, a stone was given. An impossible attempt was made to make everybody small again. Yet it was only impossible in the unsci-

entific way it was attempted. Steam and electricity had made large size possible. Instead of repealing *them*, the Sherman law was enacted.

Equal treatment of buyers by sellers, in business, is not a new idea which requires defense. True, equality of opportunity in business does not now exist, nor will it until any one can do business, so far as capital requirements are concerned, upon capital sufficient to do the business though insufficient to resist oppressive, unfair competition. Yet men are no less entitled to such equality in the business than in the political field. No man should be obliged, single-handed and without legal aid, to protect himself from bandits upon the business highway any more than upon the physical. Equal laws in the common interest should upon both equally protect all alike from unfair clubbing, economic no less than physical.

All men having been born with an equal right to the pursuit of happiness are equally entitled thereafter to continue the pursuit unless a good reason to the contrary can be shown. No seller has yet shown a good reason for discriminating among his customers, or any reason at all beyond his own selfish interest. All buyers are therefore entitled to be free from discrimination. Happiness cannot be pursued far without buying something; and a buyer who meets discrimination at the hands of a seller meets only inequality of opportunity in the pursuit

of happiness. Consequently no burden of proof rests upon any one who advocates the abolition of discrimination. The only thing that can be demanded of him is a practicable way to get it.

There has been some groping in the direction of the first rule by some of our legislatures which have passed single-price acts prohibiting discrimination with the intent, effect or purpose of monopoly. These laws are in large part ineffective, as the intent, effect or purpose can rarely be proved. These laws also entirely ignore potential competition. Potential competition is that competition which is now dormant, but which would become active in the absence of danger from unfair tactics. The intent, effect or purpose of keeping out such competition, as well as the fact that any is kept out, is hardly ever provable. Yet such competition is often the most valuable to the public interest.

These acts also usually commit the further error of allowing the trusts to discriminate in prices whenever necessary to meet competition. This is like opening the stable door to allow the horse to be stolen. The new commercialism, to be understood, must be visualized in its completeness as an agency for society to serve itself. The question it answers is: How can all the people best help themselves? not, How can some of the people help themselves best, though at the expense of their fellows? With the former question in mind, the evil of such per-

mission will appear. If allowed to follow the present system whenever they desire to meet competition, the trusts can keep small, new competitors from getting a start, although more efficient in service. Society then loses the spur and benefit of competition in such efficiency. The point of view is wrong which assumes that every one now in business is better entitled to stay in business than a new competitor is entitled to begin business.

The test should be, not whether one is now in business any more than whether he has a large capital, but whether he is capable of rendering more efficient service to society than society can have rendered by some one else. No trust or any one else should ever be allowed to meet competition in any quarter except by reducing prices generally. Otherwise valuable potential competition is possibly destroyed, and the buyers where it would spring up are wronged. Furthermore if the trust is allowed to meet competition in that locality until it destroys the new competitor there, buyers elsewhere who pay higher prices during the process are wronged, to say nothing of the possible injury by higher prices to the entire public in the end.

All buyers are entitled to buy from the same seller, at the same time, on equal terms. It is the dollar, not the buyer, that in effect comes to purchase. One man's money is as good as another's, as equal legal tender is equally guaranteed to all.

Accordingly no seller should be allowed to treat one dollar differently from another. Kant's formula of justice is now the highest expression of modern legal philosophy: That the object of law is continuously to reconcile conflicting equal free wills in equal freedom. Only perfect practice of the Golden Rule will accomplish perfect reconciliation, but it is submitted that the golden rules of selling constitute an advance in the right direction, both philosophically and ethically.

Under the second rule a monopolist of sugar will not be able to sell coffee below cost while making up the loss from consumers of sugar, only to become a coffee monopolist as well when he can again, at present, make up the loss from consumers of coffee. The first rule alone is ineffective because it only partially covers the field. Great damage can still be done by discriminations between different grades of the same commodity as well as between different commodities. No plan previously proposed has taken into account the necessity of thus linking up different commodities. Yet as unfair selling extends over the entire trade field, it is only by a remedy equally extensive that the evil can be fully met. Under this second rule the defendant will be on trial, as in a negligence case, not the general market price. The question will be whether his prices were reasonably proportionate "commercially," not arithmetically. This means from his

own standpoint, considering his circumstances, not the circumstances of some other seller. In a negligence case the question is whether the defendant was negligent, not whether some one else with better means of preventing the accident, or better eyesight, would have been.

Under the second rule of civilized commercialism, if the defendant on trial purchased a bankrupt stock of goods at one-half the ordinary market price, and then sold this stock at ten per cent. above what he paid, and sold it alongside other kinds of goods, as in a department store, which he bought in the general market and which he also sold at ten per cent. above their cost,—juries might and probably would, without question, find such a course to have been innocent. Values are questions of fact and solely for juries to decide. Juries can as easily determine whether prices are, relatively, those a man of ordinary fairness would have fixed as they now determine, in negligence cases, whether certain conduct was that of a man of ordinary prudence. Doubtless our defendant paid all the bankrupt stock was worth, in the condition in which he bought it, as he paid more than any one else would give. His prices would probably be found to be unreasonably disproportionate commercially if he had bought all his goods in the same general market, but as he purchased one set at a bankrupt sale, from his own standpoint he is

doing what the community would doubtless regard as fair selling.

He is entitled to have the public sentiment of his own community, through a jury of the vicinage, pass upon the question. If he has done wrong he should be tried before a jury. If he has done no wrong he should not be subjected to a suit in equity. It is a false plan, and enough in itself to condemn the Sherman law, that compels sellers in all parts of the country to be tried, in effect, by a jury at Washington though that jury be called the Supreme Court and receive its power to sit from its self-invented "rule of reason." That the same jury sits in each case is only a lesser contradiction, in spirit, of our inherited legal system.

The golden rules of selling leave to juries the decision whether a seller has been fair. The rules will be charged by the judge as the law. Juries will find the facts, i. e., whether the rules have been obeyed or disobeyed. Juries will do this, as they have always determined facts, by finding a verdict of guilty or not guilty. The method is exactly the same as that by which all persons charged with offenses, which the law now deems criminal, are judged by their peers. To end present evils it is necessary to have new rules of business. It is necessary to leave juries to be the judges of the facts, as under present laws, or the big, oppressive monopolist will still be, as he is now, outside the law.

Sellers, little and big, must both be under the law or both will still be, as now, outside. And with both outside there is no survival for the little. To suppress crime effectively it is necessary to have all men subject to the criminal law and leave to no man the power to decide that he himself is not a criminal.

Recognition, not of the cause of the evil, but that large combinations were doing evil, came first. A way to treat the evil was then desired by which the little fellow would be left outside the law. Only specific instances of evil, and not the evil system, were then seen. That the evil was a system was not even suspected. Like the sphinxes and chimeras which oppressed the ancient Greeks our octopus has only been named, not seen. The desire to get at the big fellow only and let the little fellow escape was natural because the latter was not seen to be doing harm. The desire arising from this oversight was largely responsible for the unscientific Sherman law cumbrosity of an equity suit under which both escape. Dissolving combinations changes not at all the evil system but only the form of those who practise evil. Furthermore, it often adds to inefficiency at the public expense.

Large corporations which can be beneficial to the public interest should never be dissolved, however large. When they are compelled to obey the rules of civilized commercialism their evil will depart but all their good, if they have any, will remain. It is

true that these rules also leave it possible for juries to convict a little fellow who may have been in fact innocent. The possibility of mistake is inherent in the administration of all our present laws, as it must always be in any human legal system. That possibility will be no greater in the administration of new business laws and it has never been considered sufficient reason for having no laws at all. Many laws, with their concomitant possibility of mistake in administration, now prohibit many things less harmful than monopoly.

No man can long expect, and few regardful of the rights of others wish, to do business or anything else contrary to the effective public sentiment of the community. Many of the methods of the trusts, as witnessed by many statutes and court decisions, have long outraged the public sentiment of the country, but that sentiment has not yet become effective. The well-tried, traditional method of making it effective is for the community to enact a penal law and leave to juries, as representative of the community, the function of determining when and by whom the law has been violated.

Business men will claim only partiality and privilege for their own evildoers if they claim other or greater consideration of their evil than that now granted other evil by an impartial jury trial. If any business men claim that their methods cannot be safely submitted to a jury of their peers, they cast

suspicion only upon themselves rather than upon the jury system. Juries can do justice in criminal business cases equally as well as in other criminal cases. If business now fears to submit itself to juries, under proper rules of law, it can only be because business is now all wrong. Business that is not now wrong will have nothing to fear from juries.

That impartiality of the law is not sufficiently majestic which merely visits with the same penalty the beggar in his rags and the millionaire in his motor car who may snatch from a passing baker's cart a needed loaf of bread. The full majesty of legal impartiality also requires that the same penalty be visited upon the great magnate who oppresses buyers as upon the small dealer who does the same *and it requires one thing more*. It requires that both the magnate and the beggar shall be equally restrained by laws which equally protect their fellow citizens from the harm which each, without restraint, is prone to render. Until that time there will be no equal law, in the true sense, and until there is equal law it will be true that the law is the friend of the rich.

In civilized commercialism, as now, a little or big fellow might have a few odds and ends, or broken lines, left over which he might wish to sell at a reduction, or below cost, and out of ordinary proportion to the rest of his prices. The rules would not prevent him from doing this so long as his course

was such as to be considered commercial by the public sentiment of his community. Doubtless it would be so considered so long as he was disposing only of bona fide odds and ends and broken lines instead of making an excuse to "run" a competitor.

In case of complaint the jury must judge this fact and not the dealer. No defendant can be left free to acquit himself. Otherwise the law would be always thwarted, as would any present law if its interpretation and enforcement were left to those charged with breaking it. The jury will also, if the evidence warrants, be free to find whether he originally overstocked on purpose in order to undersell somebody later, but if from his own standpoint the necessity of his price reduction was caused by ordinary circumstances of trade the danger of his conviction will be negligible. Only by having rules such as these, which admit of being charged to juries as the law, while leaving them free to find the facts, according to our traditional system, are they free to convict malefactors who become or remain monopolists, or near-monopolists, only by crushing little fellows. No business man, big or little, will survive in civilized commercialism except by that efficiency which is beneficial to society as well as to himself. None will survive by means of efficiency which benefits himself only at society's expense.

Manufacturers of specialty articles and trade-marked goods, as well as publishers of books, will

not then need to protect their trade by binding their retailers, by contract, to sell at the same price. The second rule of civilized commercialism will fully protect the small dealer in only one article from unfair economic clubbing at the hands of those who deal in many. And this will come about, as it should, without monopoly power to fix prices being given to any one. The power to fix prices by contract cannot be given to one set of producers without giving it to all. If it should be used by all, retailers would be as badly off as if their prices were fixed by law. Retail trade would then lose that elasticity which all trade needs and the public would also lose the benefit of competition among retailers.

This second rule, as well, will work for the benefit of society as a whole. At present some stores, following a practice akin to the gold brick game, hold "sales" in certain lines for the express purpose of attracting customers to buy those lines and in the hope, not often disappointed, that customers so attracted, once within the walls, will buy other things the prices of which have not only not been reduced but have perhaps been raised. When prices of different lines must have a reasonably similar proportion to values, commercially, this practice will stop. Customers will then be as safe in buying one line as another, as the seller will have to fix his prices, upon all lines, low enough to meet the ideas of

those experienced in values if he desires to sell experienced buyers even in one line.

The necessity of not bidding only for the custom of the inexperienced in all lines will prevent the seller from fixing any price in any line any higher than fair trade compels. The more different lines he sells the less able he will be instead of the more, as now, to work extortion. Thus buyers will here again, in the new commercialism, help each other by adding to the experience of one the experience of all in all lines to their mutual benefit instead of, as now, letting it all mostly cancel out.

The present system easily leads buyers, enmeshed as unconsciously as securely by their own lack of co-operation, like lambs to the slaughter. Each, by not helping others, only hurts himself. On the other hand, it is only by helping others that *all* can help themselves. "Bear ye one another's burdens" was no dictum of surface vision but the deepest wisdom of at least the Profoundest of all philosophers. Thus, though there have been many consumers' leagues, the best of all leagues for consumers will be that majority which votes equal commercial justice for all.

Civilized commercialism's mutual help for buyers will have further benefits for society as a whole, as it will lead sellers to struggle to survive by out-doing each other through efficiency in service instead of, as often now, through expertness in misleading

buyers. Unnecessary sellers who are least efficient as servers of society will thus be forced, whatever their capital, to transfer their energies to some other field of effort where they will be more useful. Society will be thus the gainer instead of, as often now, the loser through their eliminating to society's damage, by the power of superior capital, more efficient servers of society than themselves. There will be an automatic approximation constantly toward, never away from as often now, ideal conditions. A business system which can invite retrogression to society's loss as the present one often does, is but a barbaric system. Monopolistic barbarisms are tolerated from our present system only because monopoly is a social force which man has not yet learned to use. When he has learned to use it, he will use it not only without self-injury but with self-help, as he now uses other natural forces. The forces generated by society itself, through its own evolution, are no less natural forces from the standpoint of sociology than the forces generated by the evolution, or movement, of more inanimate substances.

It may be objected by some, with reference to this second rule, that a seller who sells in two different places may at times wish to cut his prices only at one place. True, he will doubtless wish to do as he does at present, but if the power to oppress is to be taken from him, he must be compelled to reduce at all places when he reduces at one, except

for reductions which a jury might find to be commercial. Men who sell at more than one place must be held to a sufficiently high standard of business ability or farsightedness not to overstock more at one place than at another, beyond the limits of fair commercialism, or themselves stand the consequences. Business errors of overstocking, like all others, must be paid for by somebody. There is more justice in allowing the full penalty of error in overstocking to be visited upon him who committed it than in allowing him to shift it, even in part, upon competitors and the public. To do otherwise, besides allowing opportunity for oppression and opening the way to the entire train of evils which monopoly brings, is to put a premium on partial over-production, and partial over-production is the prime cause of panics and hard times.

Deficit financiering for public bodies is now well recognized as the better policy and so in time will deficit production for most producers. It is much better for the public, as well as for both producers and dealers, to have both of the latter underestimate rather than overplunge their markets. The present trust system puts a premium on producing as much as possible but has less regard for selling the production. That system will be better which will place a premium on producing only so much as can be sold. To any extent that difficulty for the same seller to sell at many different places may

decrease the number of such sellers, the effect will be, in general, to create more small businesses; and such a result will be only a benefit to society as a whole. It will be better for society to have fewer employees and more independent business men.

Civilization can go forward to full fruition only by all men merging into a brotherhood. While the brotherhood is not now sufficiently close to allow fraternity to be made the sole basis of government, yet, as we have shown, Aristotle long ago pointed out that it was both practicable and necessary, in order to have free government, to have at least a controlling class in the state sufficiently near brotherhood for the working purposes of politics. This is the meaning of his proposition that in the ideal state the middle class outweighs in public importance both the wealthy and the indigent. The reason why it is necessary to retain a large middle class, in order to retain free government, is that the interests of the very rich and very poor are too much opposed to allow them to regard each other, in the long run, as political brothers. The present trust system of commercialism tends to destroy our middle class to the extent it tends to place all wealth in the hands of a few. In growing differences of fortune, as heretofore shown, is to be found the seed of the growing race suicide.

Growing extremes of wealth have a large effect, in themselves, toward making money, in the public

eye, almost the sole measure of merit. After a time, few are admitted to have made a success who have not made money. All wish to be successful and those who cannot be successful wish to seem successful. The longer the process goes on the wider the sentiment against having children extends. This is the way "luxury," so much inveighed against as evil in itself by the stern moralists of the ancient world, destroyed the splendid civilizations of the past or weakened them below the point of successful resistance to barbarian invasion. Luxury, like monopoly, is only a natural sociological force which society can use for good or ill. Luxury destroys a nation, or a civilization, not by what it does to the people, but by what the people do to themselves in order not to do without luxury. By noting, in contemplating our race suicide, that for the actual bread line of Malthus there has now been substituted, in the eyes of each social stratum below the highest, the line of social demarkation of the stratum above to which the stratum below aspires, it is easy to see the Malthusian theory still in active, and even frenzied, operation all about us. A commercial system which, by greatly increasing the number of small businesses and independent business men, will preserve from race suicide our middle class has everything of importance to recommend it and nothing not unimportant to be said against it.

Both from immediate considerations of justice and

future considerations of national safety and self-preservation, it is therefore obvious that any one who could grow large, commercially, only by breaking the rules of civilized commercialism will confer a greater benefit on the country by remaining small. It seems to have occurred to none that distribution, as it now distributes mostly by buying and selling, would distribute more fairly if the buying and selling rules were made fair. Caveat Emptor, custom and constitutionalism have blinded most to all unfairness there. The advantages of a slower and more even development in wealth are many. A civilized nation, in the long run, never goes forward far except as all its citizens, in the main, go together. A slower development will have the further merit that it will also enable men to learn better how to use their wealth by the time they acquire it.

The third rule of the new commercialism is but simple justice. Simple justice has a way of working many unseen benefits, and this rule will be found to eliminate the evil in "factors' agreements," "tying agreements" and like devices. When each article sold to a "factor" or in a "tied" agreement must be sold at the same price, as to the "factor" or the "tied," to all who apply with the cash, there will no longer be any object in making such agreements. This rule is necessary to round out business equality, but like the other rules of civilized com-

mercialism it is only a corollary of political equality.

Political equality was reached as the corollary of moral equality. Moral equality has as many corollaries in human affairs as man can find a practicable way to demonstrate. There need be no fear that prosecutions will be too numerous and persecutions too frequent when every sale under these rules can be made the basis of a criminal complaint. Selling is simply placed within the circle of the law, just as at present assault and battery are so encircled. As assault and battery are now criminal offenses, any one can at present be charged with them. Every jostle upon the street can be made the subject of a complaint. Yet such prosecutions are rare and persecutions therefrom are unknown. The right is there and it needs to be there to lessen jostling in general by bringing the flagrant cases into court. The others do not come because of people's common sense. It will be the same with selling.

Only flagrant cases will be complained of in court, but unfair selling uncomplained of will be much lessened, and in time mostly eliminated, as public sentiment gradually marks down the unfair seller as "unsocial" and injurious to society. Cases will also gradually become flagrant which formerly would not have been so deemed. Social ostracism has been previously suggested as the most power-

ful remedy for the trust evils. But previous to the suggestion of the rules of the new commercialism any method of exerting this great power remained unsupplied because there was no classification of those who should be socially ostracized. Social ostracism will do much because there will be much social ostracism as soon as there is a definite standard by which to ostracize.

Whether the rules of civilized commercialism are at present constitutional, is less important than whether they are right. The right solution of an evil as great as the evil of unfair monopoly, even if now unconstitutional, will become constitutional whenever wrong solutions are recognized by the majority of the people as useless. There can be no doubt, however, that under the interstate commerce clause of the Federal constitution Congress has the power to enact whatever regulations may be necessary to remove unfair monopoly—if it can be removed by regulating interstate commerce.

That these rules are only regulations is clear. No man's property is taken. No price is fixed. No corporation is dissolved. The ownership of stock is not affected even in its voting power. Directors are not prevented from interlocking, and their corporations are not only not run for them,—they are not even investigated. Civilized commercialism is but a set of rules by which all who enter or remain in business must carry on their business. Con-

stitutionally speaking, it is as much mere regulation of commerce as the prescribing of the number of pounds to be sold as a ton. The legal precedents will be discussed in detail hereafter. Acts like the Sherman law, which have already been held constitutional though often directly interfering with the composition of a business organization, are located many miles nearer the line dividing regulation from confiscation than are the rules of civilized commercialism. As sound objection to civilized commercialism upon the ground of unconstitutionality will not lie, probably the main objection aside from selfish interest will come from conservatives who will think it new and strange. Yet though their eyes, obsessed with the past, see it not, what there is of civilized commercialism that is new is not strange and what is strange is not new.

In proposing civilized commercialism we are not pulling a brand-new invention of our own out of the dark, or exposing a naked, new-born babe to an alien world. We have merely uncovered business' best basic principle by pulling aside the débris which bad-business men had heaped upon it. The new commercialism is mostly in operation already. In rounding it into a complete circle to include the entire commercial field, we have merely completed a system already largely in use and already much more used than unused. To have it used with the necessary completeness fully to protect both those

already using it and society generally, it is necessary to have it in penal law. The great majority of sellers, who are now following civilized commercialism, will not then need to change their present practices. Juries will then see that the minority do.

The entire circle of the new system has been drawn for the future entirely from the arc which appears in the experience of the past. But so much of the perimeter has already been unconsciously delimited by necessity that little remains to be consciously connected by legislation. From the plane of the primeval barter of barbarism, selling has passed in this modern age into only three different stages—retail, wholesale, and auction, or exchange, selling. High-class retail trade now follows, and all retail trade now claims to follow, the first rule. Auction and exchange selling also follow it. By a self-imposed rule, self-imposed by necessity in the guise of its own best interest, the New York Stock Exchange itself removed the last obstacle to the free operation of the first rule of civilized commercialism upon its floor when it prohibited offers of blocks of stock "all or none." Upon stock exchanges the second rule is followed, in general, with considerable precision as, if one line of investments pays a higher income in proportion to its price than another of equal safety and value, the transfer of liquid capital from less productive to more pro-

ductive investments is often almost instantaneous until the balance is restored in harmony with the rule.

All sellers everywhere who are selling for a fair commercial profit, and only a fair commercial profit, on everything are now obeying the second rule. This includes many wholesalers who also obey the other two, but such wholesalers are probably not a majority of their class.

All retail trade and all auctions and exchanges obey the third rule not only with impartiality but with alacrity. They are only too glad to sell to all who apply with the cash and they would be equally glad to sell to all who do not now apply, provided they also applied with cash. It thus only remains, in the large, to carry these rules to the wholesale field, as the other two fields, or stages, have already largely adopted them and always from necessity. Business cannot be done successfully and economically at retail upon a large scale and be done by haggling with each customer, nor can business be so conducted at auctions or upon exchanges.

A necessary element of individual haggling is secrecy, so far as buyers other than the one then haggling are concerned, and it is in secret, like many other evils in the world, that the evil in wholesaling has endured. As wholesalers have happened to continue to deal, or haggle, ever since the general barter stage mostly in secret with one buyer

at a time, necessity has not compelled, and they themselves have not all seen fit to attempt, any mending of their barbaric methods. There are no practical difficulties to prevent wholesalers from following civilized commercialism, although they may have selling agents at many different places. Most of their sales are now confirmed at the home office and such sales are really made at one place. When sales are not so made, it will be easy to change quotations at all places by the usual method from the home office. Any sale inadvertently made in violation of the rules, but in good faith, before new quotations had been received would, of course, not be criminal.

As the present privilege of sellers is mostly the privilege of present wholesalers, it is no accident that it is to the wholesale class, or stage, that the trusts chiefly belong. To bring them within equal law is much to the interest of fair retailers, as well as the rest of the public, but it is most to the interest of all trust employees. When one large concern, as now, sells hides, leather and shoes no young man, though more efficient as a server of society and with capital enough to serve it, can start a shoe store upon a shoestring and succeed. Even if he could compete with the unfair competition of a shoe trust he cannot with that of a triple trust. When he cannot embark in business for himself, owing to such conditions in the line he knows,

but must remain for life a clerk for the large concern he is only an economic serf. The nature of his serfdom is not changed because it is unacknowledged and rests upon a monopolistic basis of personal property instead of being acknowledged and resting upon a monopolistic basis of land.

The latter system, once acknowledged, was long known as feudalism. It is fast returning in a different form. The essence of serfdom is not changed by working in a store instead of upon the land or by being paid in money instead of products. It is not an abstract question of compensation or of comforts. Whether the poorest can now afford better shoes than Henry the Eighth could buy is beside the mark. A slave can live in luxury and still live enslaved. The essence of serfdom, as of slavery, is to try the door of equal opportunity and find it locked. Equal opportunity is not preserved because the clerk will be able to compete on an equal basis if he ever acquires an equal capital with that of the trust. There is no equal opportunity to acquire capital in our present commercialism any more than there was an equal opportunity to acquire fiefs in the old feudalism. The present trust employee cannot embark and stay in business against unfair competition unless he has large capital and he cannot acquire large capital unless he can stay in business. His only opportunity is therefore to stay a clerk and endure, in

new conditions, what in principle is only the old serfdom.

The present system thus greatly favors, as the former feudalism favored, the few who are powerful at the expense of the many who are poor. Yet some think that in ridding themselves of a king the American people ridded themselves of oppression and fought the final battle of freedom in the Revolutionary War! What wage worker enjoys economic freedom when he is only free to work for wages? It is not without significance that in the last thirty years the number of wage workers in the country has increased three times as fast as the population. Other reminders of the old feudalism are not wanting in the new. Vassals and paid retainers of the new feudatories are all about us, as eagerly as in the old crooking "the pregnant hinges of the knee that thrift may follow fawning."

Many lawyers, even, are now trust employees, and but trusty men at arms, instead of the independent practitioners they would have been during the first fifty years of our national existence and which they would still have to be in France or have their names removed from the roll of advocates. Yet here such now use their brains just as unconscionably to support their paymaster as the former bravos, for a like purpose, used their brawn. The present trusty retainers perceive their disgrace as little as those of old. Duty to society is as little seen by bravos now

as then. All that is ever seen by such is the duty of the hireling and the slave, which is less than the duty of a freeman. But feudalism never did and never can deal altogether with freemen. When all find out how to become free feudalism comes to an end.

Feudalism founded upon personal property has partially returned upon us only because, in new property conditions, we have not found out how all can remain freemen by maintaining equality of economic opportunity. The effect of the new feudalistic conditions upon prosperity, because of their deadly blight upon individual initiative and enterprise, has been bad, but the effect upon individual morals has been worse. Human nature is such that trust controllers easily allow themselves to stimulate, or permit, trust employees to perform acts of chicanery and oppression which they would not themselves perform personally and which the employees would not perform for themselves. Economic serfs and other underlings, in the weakness of dependence, yield many scruples which independent business men retain with pride. The tendency of "big business" has thus often been as immoral as uneconomic and it is not without a fundamental reason that its trail, where fully uncovered, has been so often seen coated with slime. More small businesses in the country, it can be said with assurance, will mean not only more prosperity for the many but more morality for all.

Foreign trade does not affect the question. A na-

tion only injures itself by deferring the adoption of a needed reform until the whole world is willing to adopt it. But just as our people should not be allowed to "dump" abroad, so abroad should not be allowed to "dump" here.

Uneconomic as our system has been, the remedies proposed have been equally uneconomic. The uneconomic quality of the Sherman law is effectively shown by the recent decision of the court which ordered the dissolution of the Harvester trust.* Five companies, controlling eighty-five per cent. of the business, had combined. If they had not combined they would, by freely competing, have compelled one to emerge as the sole survivor and that one, under the present system, might not have been the most efficient in service for society but only the one with the largest capital. The court has bidden them separate, though saying in effect that their conduct has not been wrong, in any important respect, except in the bare fact that they combined contrary to the Sherman law.

If the court had not bidden them separate there would have been no economic assurance that their combination was not repelling potential competition more valuable than themselves. The economic justification of the decision, though unexpressed by the

* 214 Fed. 987. Only the lower court has thus far passed upon this case, and the last guess, under the Sherman act, therefore yet remains to be given.

court, must be the impossibility of ascertaining whether, although no unfair competition had been proved, potential competition might not have been intimidated. Unlike civilized commercialism, the Sherman law has no touchstone for that and, although it pronounced the Harvester trust "good," it had also to hold it illegal. It dissolved it, not because it was big as some assert, but because a big trust *may* do damage. Doubtless the court leaned to that side for one of the chief reasons which instigated the Sherman law and which constitutes, though without science and in a rough way, its small saving grace.

Without fully realizing why, it was felt that the more small businesses in the country the better. Yet if the trust was not excluding potential competition, dissolving it, upon the findings, meant an economic waste. Ignorant whether or not it was committing waste, the Sherman law still dissolved. But, assuming that the trust was excluding potential competition, the Sherman law is still uneconomic because it offers no remedy except more possible waste. Competition between the five companies until only one survives will mean only the same monopoly, in effect, as under the present trust, and yet the surviving company may be the least efficient of the five in service for society if that one has sufficient capital. The court says there is no limit under American law to which a business may not inde-

pendently grow, and this latter monopoly would thus be perfectly legal under the Sherman law as thus interpreted though more inefficient, as an economic agent of society, than the first which is now ordered dissolved. The imbecility of a king of France in marching an army up a hill in order to march it down again is proverbial, but even this imbecility is much outdone by the readiness of the Sherman law to march a monopoly up a hill in order to march it down again still farther.

The country cannot remain satisfied with the Sherman law because it cannot stop with an unscientific solution, or rather an unscientific attempt at a solution, of the problem of monopoly. It must go on to a scientific and sensible solution and such a solution, in a country whose basic principle is equality of opportunity, cannot be had short of a new and civilized commercialism. The pursuit of unfair competition by a commission through contempt of court process, aside from other inherent defects, is too tardy and admits of too much favoritism. A commission which attempts less than civilized commercialism will not do well. But even if a commission had the authority and the inclination to enforce civilized commercialism generally, it could not possibly do it half so well as all the people can enforce a general penal law. Contempt of court process, outside of its own proper field and suffering nostalgia in that of the criminal law, is only a toy pistol.

There need be no fear that competition in civilized commercialism will not be nation wide. It will not be confined to small zones, limited by freight cost, because the zone of each seller will overlap with others on all sides. If they do not at first do so, midway and overlapping producers will start whenever they can do so at a profit. As unfair competition will not be feared, the chief present motives for dividing territory by agreement and for making price-fixing agreements will be wanting. With unfair competition eliminated, such agreements will be without appeal to the efficient and, without the efficient, without utility to the inefficient. Each producer in every zone the country over must sell everywhere at one price, f. o. b. (except as affected in a proper case by local cost). whatever the zone of his customer. Each producer will desire constantly to increase his zone. To get any trade in any part where any one competes, he must therefore meet competition.

This competition must in turn meet other competitors farther away, and the desired nation-wide competition will thus be passed on as by the familiar row of bricks in the books on economics. The present "blanket" system of railroad freight rates, by which the country is divided into "common points," will greatly aid this process. Besides other benefits in civilized commercialism the gov-

ernment will save both the expense of dissolving combinations and of reorganizing and readjusting them. All at their own expense will automatically readjust themselves sufficiently to allow their officers and controllers to clear the criminal law. Business men will then know in advance, as they do not now though they are entitled to the information, both what they can and what they cannot lawfully do and they will also know that it will be easy to comply with the three rules of civilized commercialism. So long as they obey those rules they will be free to adopt any corporate organization or combination they prefer, and handle their own capital in their own business in any way they like, without hindrance or oversight.

The principles of civilized commercialism, properly applied, will obviate oppression by buyers as well as by sellers. The Beef trust rose to supremacy because, buying from many small producers over a wide field, it was able gradually to eliminate local buyers by temporarily offering higher prices, though at a loss to itself, in places where there was competition. In this way it destroyed the local slaughter houses and turned local butchers into its own clerks. Large creameries buying over a wide territory have followed the same tactics. Similar "intent" single-price buying statutes have been enacted, but with similar defects. Civilized commercialism by forcing all such buyers to give sellers equal treatment every-

where will likewise meet this evil by substituting, in the buying as in the selling field, full business liberty and equality for business oppression. Business despotism will then have been regulated into a business republic.

The Beef trust made itself the center to which all beef was sent to be killed and from which it was all sent over the country for sale. It monopolized the supply early and at a time when the supply equaled the public demand even at a low price. As transportation had to be paid both ways and monopoly enabled the trust to take the benefit of by-products to itself, producers could only afford to raise cattle where the herds could be large and the grazing land was cheap. As those lands have been settled, the herds there have gradually decreased until the supply is now much less and the price of beef much higher. New evils are now seen to have been inherent in maleficent monopoly. At the end of this particular orgy of monopoly the country finds itself without local slaughter houses and without much inclination among farmers to raise beef for local consumption, as most have long since turned to other crops.

Had civilized commercialism been in operation the Beef trust, however efficient in by-products, would hardly have grown so large. More local buyers would have been able to compete with it, and now, when conditions have changed, the country would

not be found so largely without local slaughter houses and local cattle. Besides many other benefits to the country, the machinery to a much larger extent would be still in operation with which to supply the increasing deficiency of beef and keep down the cost of living.

In viewing the benefits of civilized commercialism for society as a whole, its special blessing for the rich must not be overlooked, for a special benefit, besides a better country to live in, is theirs. There can be little respect for success which is little respectable. The only way to have wealth much respected, instead of envied, is to make it the result of service instead of oppression. When it can well be, as it too often is at present, the result only of oppression, the instances in which wealth may be, in spite of the system, the result of service are too often overlooked. Some will doubtless claim that without discrimination *their* business cannot be done. It was once the plea of the railroads that, without the right to drive a separate, secret and different dicker with each shipper, freight car wheels would probably refuse to turn and certainly dividends could not be paid. Experience has proved fossilized railroad men to have been in error. Fossilization is doubtless now much less common among business men than it formerly was among railroad men. Whether such be few or many, experience will likewise prove them in equal error.

Instead of the present elaborate system of discounts in some instances,—a subterfuge for different prices,—the same price will be given to all customers, whether cash or credit. The credit customer will then be maintained on an equality with the cash customer by an interest charge—understandable by all men, as many present discount schemes are not. Credit sales, merely, will have interest added instead of cash having discount deducted. Some sellers doubtless now suppose it proper for them to charge that buyer an extra price whose credit they consider weak. Yet by guessing as to whose credit is weakest they are only making themselves judges in their own cases. Backward as the law has been in many directions, it long ago saw the evil in this. No seller now sells upon credit to any one from whom he believes he will not receive payment. In guessing as to who will and who will not prove “slow,” and if “slow” how slow, he is at most only ineffectively trying to be a prophet. Whenever he makes a mistake, and he must make many, he commits an injustice.

The proper method will be to spread the estimated amount of bad bills over the entire business as an overhead charge and thus allow it to be reflected in the price to all. Such a loss is a mere incident of the business and the seller cannot, under any plan of equal justice, be allowed to parcel it out by whim, guesswork or favoritism as he sees fit. As a seller

is neither a prophet nor a son of a prophet he cannot possibly, in this respect, do equal justice. All buyers should therefore bear this burden equally, in proportion to their buying, rather than allow the seller arbitrarily to foist it upon some unequally. The former method will also tend to make the seller more careful of his credits and so have a general beneficial effect. At present he often gambles—and the temptation to gamble is great—when a buyer whose credit the seller considers poor, offers a high price. In civilized commercialism when a seller fixes his price to take this gamble he will see himself losing cash customers at the other end because they will be able to buy more cheaply elsewhere. With this gambling temptation removed business will tend to some extent, from this cause alone, to place itself upon a more conservative and substantial basis.

Some of the other benefits of civilized commercialism can be summarized as follows:

1. Business men will know in advance both what they can and cannot lawfully do.
2. Corporate forms and combinations, as such, will be subject to no interference.
3. Even the largest monopoly will be free to exist in peace if its monopoly comes only from superior economy and efficiency. Everybody will know, if it is obeying the rules, that its monopoly can come from nothing else.

4. Competition will be free and fair. Business oppression will be eliminated and all will enjoy, so far as laws are concerned, equality of economic opportunity.

5. Success to seller or buyer will come only from service. Success will be a real certificate of merit and business merit will at last have a barometer.

6. Society will be able to utilize the best service agents and those only.

7. Society will receive the highest producing efficiency, viz.: The best goods at the lowest prices.

8. Society's cost of living will be reduced somewhat.

9. Defendants will be tried by a jury of the vicinage and thus have to satisfy, in their business methods, only the public sentiment of their own community.

10. Simple rules will be given to juries as the law, and they will be the sole judges of the facts as in all present criminal cases except those under the Sherman law. There the Supreme Court, pursuant to its "rule of reason," now decides in each new case what the rules are and whether they apply to the new facts.

11. Guilt will be personal and personal only. Innocent stockholders will no longer suffer.

12. Society will receive the benefit of collective bargaining. The law of supply and demand will be left free. The seller and his customers collectively,

merely, will be the two bargainers instead of there being as many pairs of bargainers as the seller has customers with the seller the constant, and constantly practised, party in each pair. Every barbaric seller now dickers with each customer from the standpoint that the only available supply is the amount that customer desires. The price then reached is oftener the highest the buyer will give than the lowest the seller would take. In civilized commercialism the seller will lose his present privilege because it will be for the seller's self-interest to deal with each buyer from the standpoint of the seller's entire supply. "All that the traffic will bear" will not mean in civilized commercialism all that it means in barbaric. All customers, as well as all communities, considered as a whole will "bear" much less collectively than separately—for the reason that in union there is strength to resist. The expert, with his greater strength in bargaining power, will no longer live for himself alone. Buyers will help each other instead of, as now, only helping commercial wolves to help themselves.

13. Business will be placed under the law and upon a social basis but without socialism. Business will at last be governed by laws, not by men. The worker who accumulates capital enough to do business will be able to do it without fear of unfair competition by the largest trust.

14. Success for the individual as seller or buyer

will mean service to society, and service to society, under the new system, will mean success for the individual. Success for the individual as buyer or seller, at society's expense, will be no longer possible.

15. Trial by a jury at Washington, and the same jury in each case, making its own law, will be avoided.

16. Expense for the government and labor for the courts in dissolving and reconstituting trusts will terminate. Elaborate and expensive equity investigations will end. Criminal issues will be of simple fact: "Was the rule broken?"

17. Business morals will be greatly elevated.

18. The morals of society generally will receive a due elevating effect from business instead of, as at present, a grave and depressing handicap.

CHAPTER V

CONSTITUTIONALITY OF CIVILIZED COMMERCIALISM

NO man can make property of oppression or shield privilege behind the constitution. Property so used as to injure the common good ceases to such extent to be property. This follows from the fact that the safety of the state—the supreme law—overrides individual profit. With impunity none commits public nuisance. None can sap the happiness of the people and gain the right because he owns something. That right was never a part of his property. Such a right could not be owned. He merely exercised the obnoxious use upon sufferance. Its title was long ago yielded to the common good for the privilege of living in society as an equal, not a master. When property comes by privilege or oppression into collision with the common good either the state must take property or property the state. In such case free states take property without compensation rather than allow an individual without compensation to take the property of all—the common good. While asleep he has

merely been dreaming the property was his, though often he thinks the dream true when awake. Kindly but firmly must he be told the only way to regain his property—to go to sleep again, out of court.

In courts slaves were once held property but the courts were then dreaming too. The higher law finally well applied, Justice in her blindness always held out to judges who would not wake and see her. Once the judges were awake they were bound to hold, and did, that the soil of England was so free no slave could bear a shackle there. This was always the law of England and the common law which is our own. It is, in spirit, but the law which business needs to have applied to it now. Paramount to individual profit is the common good. When the two collide the former must go down.

Whether or not civilized commercialism would be constitutional is not determinative of its value. It is admitted by most that monopoly is bad, that the present business system tends to breed monopoly and that, as a result, present social unrest is great. Present conditions are admitted by all to be bad enough to warrant amending the constitution provided any amendment can make them better. The first question to be decided, therefore, is whether civilized commercialism would improve conditions, not whether it would be constitutional. Yet it will not be hard to demonstrate that it would also be constitutional.

Regulations comprising civilized commercialism would be enacted by the states under the police power and by the United States under the interstate commerce clause of the Federal constitution. It will be convenient to consider, first, the scope of the police power and then, next, the authority of Congress under the interstate commerce clause.

Regulatory statutes already referred to have been enacted by various states and have been upheld. The first case arose in Nebraska where in upholding the Nebraska act (Laws 1907, ch. 157) the Nebraska Supreme Court in *State against Drayton* (82 Neb. 254) wrote: "It (the act in question) does not seek to prevent any person or corporation from engaging in any lawful business, nor does it prevent legitimate competition, nor seek to interfere in any way with the due management of any one's business, nor prevent the sale of any commodity at any price which the owner may fix or demand. Indeed, the act recognizes the right of all to engage in the production, manufacture, distribution and sale of any and all commodities in general use. There is a clear recognition in law, in commerce, and in the possession and use of property, that every person has the right to use his own as he sees fit, so long as he does not wrongfully use it in such a way as to interfere with the rights of others. The whole fabric of civilized, social and commercial life, and the enjoyment of liberty and ownership of property, are

based upon compromises and limitations of the use of one's members and the control of his property" (pp. 259-60).

"It is within the knowledge of all that in many instances persons engaged in the sale of commodities in general use by the people have depressed prices in one locality, where there was competition, and increased them in others, where there was none, thus avoiding loss, until the competitor was driven out of business, when prices would be raised to an unreasonable and oppressive extent, and the people of the district or community supplied from that point would be the sufferers" (pp. 260-1).

"The law afforded no protection from the injurious effects of such predatory course. If no protection could be afforded to the people who were compelled to purchase the commodities, it would be easily within the range of possibilities for one person or corporation to practically control the whole commerce of a community, a county, or even the state, exacting such prices as greed might dictate, and yet seeing to it that no others should be allowed to engage in a similar business as competitors. It is within the knowledge of all of mature years that within the last quarter or half century the meats furnished the people of our cities and towns were supplied by local dealers who purchased their live stock from the nearby farmer or stock grower, slaughtered the animals, and supplied wholesome

meats at reasonable prices, and yet paid remunerative prices for the live animals, saving the cost of transportation to and from what are now the exclusive points of manufacture and production. That both the producers and consumers are losers is known to all. That this condition has been brought about by a system of coercion and under-selling 'for the purpose of destroying the business' of local competitors is also known to all. Is there no power anywhere lodged in the state to prevent this or remedy the evil?" (p. 261).

"The rule upon this subject can, perhaps, be no more clearly expressed by us than by the following: 'Under the police power the state can interfere whenever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests' " (22 Am. and Eng. Ency. Law 936) (p. 263).

"As said in *Yick Wo v. Hopkins*, 118 U. S. 356, and quoted in *Powell v. Pennsylvania*, 127 U. S. 678:

" 'The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable

in any country where freedom prevails, as being the essence of slavery itself' ” (p. 264).

The next case arose in South Dakota where in upholding its state statute (Laws 1907, ch. 131) the South Dakota Supreme Court in State against Central Lumber Company (24 So. Dak. 136) said: “The great and only excusable reason for the prescribing of any rule of conduct is to promote justice between man and his fellows in their relations as members of a social or political body. As was well said by Webster: ‘Justice is the greatest thing on earth.’ Law may be defined as the aggregate of those rules and principles of conduct promulgated by the legislative authority or established by local custom, and our laws are the resultant derived from a combination of the divine or moral laws, the laws of nature, and human experience as such resultant has been evolved by human intellect, influenced by the virtues of the ages. Human laws must therefore of necessity continually change as human experience shall prove the necessity of new laws to meet new evils, or evils which have taken upon themselves new forms, or as the public conscience shall change, thus viewing matters from a different moral viewpoint.

“The effort to promote and effectuate justice by means of human laws has been a continuous fight against human selfishness, especially human avarice and greed, a continual effort to protect the weak against the strong. It is the boast of our law that

it protects its wards in the full and free enjoyment of their lives, their liberties, and their property; and the cry that is always heard when any law is attacked on constitutional grounds is that it has, in some manner and to some degree, wrongfully deprived some one of equal protection in those cherished rights of life, liberty, and property. Yet common sense, as well as experience, has taught us that only through restraint can there be liberty; that as members of one great social order, we can only be protected in our most treasured rights by at the same time being restrained in the use of the same so as not to deprive our fellowman of the equal enjoyment of such rights. Thus men have often been deprived of property, liberty, and even life, taken by the strong arm of law as a forfeit, a penalty, for having infringed on the rights of their fellows.

“Among those things which human experience and the public conscience early recognized as essential and necessary to the highest welfare of all, was the right of free and equal competition in the struggles of life, not the right of freedom to crush one's fellows by force of brute strength or the equal brute force of greater wealth or power, but the right to have brute force, wealth, and power so restrained as to place the weakest, poorest, and lowliest on a free equality, before the law, with the strongest, richest, and most powerful. From

an early date there have been laws against contracts and combinations in restraint of trade, and such laws became a part of the common law of this country. While practices in conflict with such laws have, at all times, been more or less frequent, yet, owing to industrial conditions existing up to the past fifty years, such practices had never become any serious menace to the rights of mankind; but, with the wonderful advance in industrial pursuits, and the vast accumulations of wealth during the past half century, there came new methods of business, including vast combinations to control the articles of commerce, bringing an awakening of public conscience to the evils thereof, and, as a result, many statutes were enacted, and even amendments to Constitutions adopted, aiming to the restoration of freedom and equality in commerce. The evils experienced being almost entirely those flowing from monopolies created through combinations, there were enacted what are known as the 'anti-monopoly statutes,' not merely making such combinations in restraint of trade unlawful from a civil point of view, but making such combinations criminal'' (pp. 150-1).

“The statutes of most states, up to very recent years, were aimed only at monopolies brought about through combinations, so that, in treating of the subject of monopoly, both textbook writers and judges have spoken of them as though monopoly and

combination were one and the same, thus causing many to consider that there could be no monopoly except there was combination, while, as a matter of fact, combination is simply a means, and but one of many means, by which a monopoly is acquired; monopoly being the end sought, combination a means therefor" (p. 152).

"While our lawmakers and courts were busy trying to cure the evil of monopoly by destroying combinations created therefor, human ingenuity, prompted by avarice and greed, was also busy devising methods of evading the law and creating a monopoly without combination, and the brains at the head of the most powerful corporations known to mankind soon discovered a way. Every person of mature years well knows the success that has attended their efforts along this line and the result thereof.

"To get rid of competition, and thus acquire a monopoly, the man, firm, or corporation possessed of, or controlling, large capital no longer said to his competitor: 'Let us combine, and thus obtain a monopoly of the business we are engaged in, and by so doing increase our profits by raising prices to the consumer.' No, that would be criminal, and might lead to trouble, and, too, it was a crude way of acquiring the thing sought. Now he says to a competitor, if such competitor be weaker than he: 'Get out of my way. Sell me your business,

or I will destroy it by unfair competition'—or in many cases, without giving his victim a chance to sell to him the business he has, he sets about destroying it, and by a method as certain as the passing of time, a method that need bring to him not even an immediate financial loss. He puts the price of the commodity handled so low, at the point where his victim is in business, as to make it impossible to meet such price except at a loss, and, to offset what loss he suffers at that point, he raises prices at one or more other points. As soon as this practice became quite prevalent, the public realized that an old evil was being brought upon them by a new method; a method that not only tended as its natural and necessary result to place a monopoly into the hands of the strong, but did not, as before, permit the competitor to share in the fruits of the wrong—an evil bringing loss to the public and wrong and injustice to the weak tradesman. Again human experience, recognizing the laws of God and nature, controlled and guided by an aroused public conscience, evolved a new law, and placed it upon the statute books of this and many other states, a law aimed at monopolies obtained through unfair competition. The question before this court, as it was before the court in case of *State v. Drayton* (Neb.) 17 N. W. 768, is, Are these laws constitutional as being within the scope of the police powers, or is the state helpless to grapple with and destroy this

new evil, because in so doing it will take from the wrongdoer the full enjoyment of right to life, liberty, and property!" (pp. 152-3).

"The Legislature recognized the evil, and acted with full knowledge of the necessity confronting it, and shall we say that it has exceeded its powers in passing a law of this nature? As said by the court in *State v. Drayton*, *supra*: 'At the beginning of our investigations we are confronted with the oft-repeated and well-settled doctrine that no act of the lawmaking power of the state can be held unconstitutional, unless it is clearly violative of the provisions of the Constitution; that, if it is legally possible to sustain legislative enactments, they should not be held void. We are further met with another well-known rule that what is known as the police power is inherent in every government, and does not depend upon legislative grants or limitations. Then unless the act under consideration is open to attack as in violation of the written provisions of the fundamental law, or an illegal effort to extend the police power over a subject which cannot be brought within the rightful exercise of that power, the law must be sustained. It must also be remembered that with reference to the latter subject the legislative department of the state, within well-known and well-defined limitations, is the sole judge as to when and how that power is to be exercised. From a careful reading and study of

the act in question we are driven to the conclusion that it is not subject to attack upon either of the grounds named' " (pp. 154-5).

The court quotes from the Supreme Court of the United States:

"It would be idle and trite to say that no right is absolute. *Sic utere tuo ut alienum non laedas* is of universal and prevading obligation. It is a condition upon which all property is held. Its application to particular conditions must necessarily be within the reasonable discretion of the legislative power (*Orient Iron Ins. Co. v. Daggs*, 172 U. S. 566)" (p. 172). And then continues:

"Human experience certainly teaches that men are usually controlled by some motive, either laudable or otherwise, in their business transactions with their fellow men; and, when the public, as in the case at bar, sees any person or corporation establishing a radically different price at a point of competition from that fixed at another point, it is the natural conclusion, based upon human experience, that such party has some ulterior motive, that he is not fixing such prices out of any feeling of kindness toward the people of such community, but that he expects eventually to obtain benefit therefrom; and it is therefore the conclusion of the public that it is the motive of such wrongdoer to drive the competitor out of business, and thereafter recoup such loss as he may have suffered during said

process of destruction by an increase in price after a monopoly has been acquired" (p. 172).

"Summarizing all we have said herein: The law-makers of this state, taking notice of a business practice known to all men, and which had grown in rapid strides during past years, until it was threatening the welfare and liberties of a free people by its tendency to create monopolies in the articles of commerce, thus leaving the consumers the helpless prey to the avarice of the holders of such monopolies, passed the law in question to cure the above-mentioned evil; the law is sufficient" * * * (p. 173).

In unanimously affirming this unanimous decision the Supreme Court of the United States, per Mr. Justice Holmes, held:

"The subject-matter, like the rest of the criminal law, is under the control of the legislature of South Dakota, by virtue of its general powers, unless the statute conflicts as alleged with the Constitution of the United States. * * * We must assume that the legislature of South Dakota considered that people selling in two places made the prohibited use of their opportunities and that such use was harmful, although the usual efforts of competitors were desired. It might have been argued to the legislature with more force than it can be to us that recoupment in one place of losses in another is merely an instance of financial ability to

compete. If the legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their State, and that there was no other case of frequent occurrence where the same could be said, we cannot review their economics or their facts" (*Central Lumber Company v. South Dakota*, 226 U. S. 157, 159, 161).

In upholding the Minnesota selling statute (Laws 1907, ch. 269) which is limited to "petroleum or any of its products," the Supreme Court of Minnesota in *State ex rel. Young against Standard Oil Company* (111 Minn. 85) wrote: "The constitution was not intended to restrain a proper advance in statutory law. The strength of the federal constitution lies largely in its flexibility, and a vast array of business activities are now recognized as under its protection, the possibility of which was unknown when the constitution was adopted; and it is also true that much governmental power which has been dormant may be exercised without violence to its provisions" (p. 95).

"The law under consideration must be regarded as one supplementary to and in aid of the statutes designed to preserve competition generally, and if, as to this particular class of commodities, special regulations are necessary to restrain a monopoly in them, those dealing in such commodities are not

denied equal privileges, but, upon the contrary, are by such special regulation placed upon an equality with dealers in other articles of commerce" (pp. 98-9).

In upholding the Minnesota buying statute (Laws 1909, ch. 468) regulating those "engaged in the business of buying milk, cream or butter fat for the purpose of manufacture," the Supreme Court of Minnesota in *State against Bridgeman and Russell Company* (117 Minn. 186) said: "Classification for purposes of legislation is a matter of legislative policy and discretion, and it is only when a classification is manifestly arbitrary that the courts will declare a statute unconstitutional. If there be any fair doubt in any case, it must be resolved in favor of the validity of the classification" (p. 188).

"Our consideration of the subject has led us to the conclusion that the business of buying milk, cream, and butter fat for the purpose of manufacture, when carried on by parties controlling ample capital, with large central plants and local purchasing points extending over wide territory, affords special facilities and motives for the creation of monopolies by the temporary maintenance of artificial prices at competitive local points, and, further, that there is in this respect a substantial distinction between the purchase of milk, cream, and butter fat for manufacture and their purchase for resale or consumption" (p. 190).

In upholding the Iowa buying statute (Laws 1909, ch. 222) regulating those "engaged in the business of buying milk, cream or butter fat for the purpose of manufacture, or of buying poultry, eggs or grain for the purpose of sale or storage," the Supreme Court of Iowa in *State against Fairmont Creamery Company* (153 Ia. 702) said:

"One of the great legislative problems of the day is to protect fair competition in the business world without unduly interfering with the freedom of contract. We may properly presume that the problem is greater in some lines of business than in others. In the purchase of commodities, the methods of business adopted are quite as various as the different commodities. Methods are adopted which are peculiar and limited to dealings in a certain commodity. Evil practices, therefore, may arise in the business methods pertaining to one commodity, which do not obtain at all in relation to other commodities. Practices may obtain which contravene no statute, and which, nevertheless, would be deemed as morally dishonest and detrimental to the public interest. If it be true that large corporations enter the creamery business and cover a large territory, including many purchasing points, and if it be true that they resort to methods which would be deemed morally dishonest and unjust in order to obtain a monopoly of the creamery business in the territory which they so occupy, then a situation is presented

which fairly calls for legislative attention. * * *

It is quite manifest that a company sufficiently large in its capital and in the scope of its business could obtain a monopoly for itself in whatever territory it chose, by adopting the methods which are enumerated and prohibited in the statute. The temporary maintenance of artificial prices for the sole purpose of destroying a weaker competitor and creating a monopoly is one of the modern evil inventions. All that is required for its sure success is that there be great inequality of financial resources in favor of the offending party. A multitude of people buy milk and cream for immediate consumption. Comparatively few buy milk and cream 'for the purpose of manufacture.' To the multitude who buy for immediate consumption, a monopoly would be quite impossible, and its attempt quite absurd. But those who buy milk and cream 'for the purpose of manufacture' sustain a distinctly different relation to the trade and to the community in which they operate. The magnitude of their operations is limited only by the magnitude of their resources. The motive to monopolize is present as well as the ability to reap its fruits when acquired. In the nature of the case, the discriminations which are condemned in the legislative act are practicable as a practice only to those who engage in the business on a large scale. We are impressed, therefore, that the classification adopted is one that

arises quite naturally, and that it rests upon a substantial and practical distinction. Substantially the same reasoning is applicable to those persons who 'buy poultry, eggs, and grain for storage.' * * * New days bring new problems. Legislation must meet these problems as they come; otherwise our plan of government must prove inadequate" (pp. 709-11).

The court then quotes from *Gundling* against *Chicago* (177 U. S. 183) as follows:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrarily interfered with or destroyed, without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for federal interference."

The court also quotes from *Carroll* against *Greenwich Insurance Company* (199 U. S. 401): "If an evil is specially experienced in a particular branch of business, the Constitution embodies no prohibi-

tion of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms. It does not forbid the cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation. *Otis v. Parker*, 187 U. S. 606, 610, 611. And if this be true, then, in view of the possible teachings to be drawn from a practical knowledge of the business concerned, it is proper that courts should be very cautious in condemning what Legislatures have approved."

In *Noble State Bank against Haskell* (219 U. S. 104) the United States Supreme Court, per Mr. Justice Holmes, referred to the police power as follows: "It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. * * * There are many things that a man might do at common law that the States may forbid. He might embezzle until a statute cut down his liberty" (pp. 111, 113).

In Tiedeman's *State and Federal Control of Per-*

sons and Property it is said: "By this 'general police power of the State, persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the State; of the perfect right in the legislature to do which no question ever was or upon acknowledged general principles ever can be made, so far as natural persons are concerned,' " quoting Chief Justice Redfield in Thorpe against Rutland, etc., Railroad Company (27 Vt. 140).

An earlier seer of the law, Sir William Blackstone, defined the police power to be "the due regulation and domestic order of the kingdom, whereby the inhabitants of a State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations" (4 Bl. Com. 162). The brotherhood of man was thus not altogether unperceived by Blackstone as the foundation of civil liberty. Decency and inoffensiveness, as they then in his view necessarily applied to all, must now apply to "big business" as well as little business.

None of the statutes referred to possesses the full essentials of civilized commercialism. All, in their gropings toward the light, in some way fall short of scientific thoroughness. None presents a definite rule for different grades or any rule for different

commodities. None gives equality to all. They do not enforce the one-price everywhere at all times without regard to "intent" or "effect." They (except New Jersey's statute which includes "effect" and the Clayton act which omits "intent") allow different prices when no injury is intended though the same evil may be done. Yet the respects in which each falls short tends in no way to place it farther within the police power. The power of prohibition under the police power extends to whatever may be necessary to prevent the evil.

If a certain practice, such as carrying concealed weapons, in the judgment of the legislature must be prohibited in order materially to decrease sudden shootings, the legislature is not limited to prohibiting shooting but can prohibit shooting irons. It accordingly does so, and the carrying of one has become a crime in most of our states, even though there be no intention to shoot. If unequal selling is a practice also calculated to injure, legislatures are not limited to prohibiting the injury but can also inhibit the practice without regard to intent. In Civil Rights acts intent was always omitted (New York Penal Law, §514). This was of course necessary, as exclusion from theaters might often be with intent to benefit, not to injure, the party excluded. In many cases only thus can legislatures effectively limit the evil. Though this is elementary it is especially true in the case of unfair competition, as

the large element of potential competition may often be entirely crushed without provable intent or any provable "effect" called for by the New Jersey or Clayton act.

In this connection it is apposite to call attention to the language used by Mr. Justice Harlan in *Standard Oil Company against United States* (221 U. S. 1, 97), himself quoting Senator Nelson on behalf of the Senate Judiciary Committee, who in turn quoted Chief Justice Andrews of New York in *People against Sheldon* (139 N. Y. 264) as follows: "*If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character.* If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing."

The difficulty in proving "intent" or "effect" is equally great. To the usual difficulties in gathering evidence and witnesses in any case, most extraordinary and often insurmountable obstacles would be added in the case of potential competition. Often a potential competitor does not know, without an opportunity, that he would become a competitor with an opportunity. Men's minds seldom or never know to what opportunities they will rise until the opportunities present themselves. With the door

closed few could testify they would compete were it open, although many—even of those who when it was closed believed they would not—might be spurred to do so once it was open. Men's minds constantly change, often by the example of others. In all cases where it could not be proved that the "effect" of unfair competition, or unequal selling, was restraining trade, it yet might be entirely possible, and even probable, that much potential but unprovable competition was being eliminated and that trade was much restrained or a monopoly created which potential competition—with the opportunity of civilized commercialism—would prevent.

As a test, intent, like "effect," is neither proper nor conclusive. Both are unscientific. Both are quack. There is no distinction that can be drawn in all cases between intent to help one's self and intent to injure others when the same act does both. Nor would the evil be entirely remedied if all intentional monopolistic practices were prevented.

Unequal selling may be done without intent to monopolize, or injure a competitor, and yet do the same damage. It may be done because the selling company is in urgent need of ready money even to prevent failure, perhaps from carrying too much water on its back. The local underselling may still be carried on long enough to crush a smaller and more efficient local competitor. His business is de-

stroyed just the same whether or not the unequal selling was aimed at him and whether or not the large company, or trust, remains in business long enough to put up prices. Even if he remains in business he has been disproportionately damaged by a business disturbance, locally focused, which should have been spread over the trust's entire trade field.

Intent not to injure is no more applicable, as an excuse, than in the case of one who knowingly discharges a gun in a crowded street. That he did not intend to injure any one is immaterial. The law holds him to have intended the natural result of his act. The law also holds his act so liable to injure that it must be prohibited without regard to intent to injure, even though in some cases of innocent intent no injury might result. Accordingly the law forbids his act whether he intends to injure any one or not. Though it does not hold him for murder if he kills no one, an intent not to kill does not excuse his disorderly conduct and breach of the public peace. Under the equally inapplicable excuse of intent not to monopolize, the business peace has been too long broken to the greater injury of the general public. Sellers are allowed, under these statutes, to cut prices to help themselves but not to injure others. Whatever the purpose of the cut the effect, whether provable or unprovable, is liable to be the same—to help themselves by injuring others.

In the Drayton case the Nebraska court recognizes this by saying: "It may be that by underselling others he may draw trade away from them, or, indeed, the secondary effect may be to compel them to adopt his scale of prices or abandon their business, yet, if his conduct is not for the purpose and with the intention prohibited by the statute, he is violating no law, and no one can legally object to or interfere with his methods" (p. 260).

This rule is unworkable with fairness. It is also inadequate as protection because it is arbitrarily based on an unsound principle. It assumes that every case will be so extreme there will be no difficulty in classifying it. Yet most of the cases that arise are upon medium ground and only the extremes, at best, can be correctly decided under this rule with reasonable certainty. This will prove as true of "effect" as it has of intent. It is not enough to have a workable law against first degree murder only. Much evil can arise from killings in other degrees. This is one of the many reasons why our anti-monopoly statutes have thus far proved ineffective. Another is the time necessarily consumed in working up a case under them. When the intent is not admitted, much investigation is necessary to secure facts from which to draw inferences. It took the government four years to secure the evidence upon which to frame its complaint in the Steel trust dissolution suit under the Sherman law.

Too much killing can be done in four years (not to mention the years of the suit) to make this method satisfactory. Yet before all this investigation a bad trust may now pass as "good." In civilized commercialism all trusts will be good, but bad acts of individuals will be punished whenever they are committed. Investigation of a trust's entire business will be unnecessary to the investigation of a bad act and the punishment of a criminal.

We have previously treated of permission to discriminate "to meet competition." Let us next proceed to consider the authority of Congress under the interstate commerce clause.

The authority of Congress over interstate commerce is derived from these words in the constitution: "Congress shall have power to regulate commerce * * * among the several States."

As to the extent of this authority under the interstate commerce clause, it was laid down in 1824 by Mr. Chief Justice Marshall in the celebrated case of *Gibbons against Ogden* (9 Wheat. 1) that: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse" (pp. 189-90).

"We are now arrived at the inquiry—What is this power?

“It is the power to regulate; that is to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution” (p. 196).

In the many years which have since elapsed the Supreme Court has never abated jot or tittle of this pronouncement by its great Chief Justice of the supremacy of Congress over interstate commerce (*United States v. Union Pacific Railroad Company*, 226 U. S. 62 (Oct. 1912)). It is paramount to the states' police power (*In re Rahrer*, 140 U. S. 545). In *Wilson against New*, a case upholding the constitutionality of the Adamson act, former rulings of the Supreme Court that the power of Congress to regulate interstate commerce extends to whatever may be necessary to protect the public interest have very recently been reaffirmed (243 U. S. 332, decided March 19, 1917).

That civilized commercialism, within the meaning of the constitution, will merely regulate commerce by prescribing rules for carrying on commercial intercourse would seem too plain for cavil or dissent. No property is taken. No prices are fixed. Every one retains full and equal liberty to use his property as he pleases subject to rules necessary to the full and equal liberty of all. These are rules

only of "good neighborhood." Not a cent that anybody now has is confiscated. But fair rules are framed for the future under which the distribution of wealth will henceforth be more equal. In *Central Lumber Company against South Dakota*, supra, the Supreme Court has already decided that a one-price statute is merely regulation. The headnote begins: "Regulating discriminatory sales," etc. Regulation under the police power is necessarily regulation under the interstate commerce clause, provided it refers to interstate commerce.

In civilized commercialism administrative commissions will interfere with no man's business. Combinations are left under equal rules to work out in peace all possible economies. On the other hand the "little fellow" who deserves to succeed, fighting at last an equal fight, will neither deserve nor need governmental aid against the most powerful rival. His right of business equality will be secure. More he cannot claim. At last his business, like his personal, liberty and life will be equally assured by the strong right arm of the criminal law. To raise any question of the power of Congress by enactment to extend civilized commercialism to interstate commerce, "Powerful and ingenious minds" must indeed, in the language of Mr. Chief Justice Marshall in *Gibbons against Ogden*, by "refined and metaphysical reasoning," * * * "so entangle and perplex the understanding, as to obscure principles,

which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived."

In *United States against Union Pacific Railroad Company*, *supra*, referring to the Sherman act, it is said: "The act is intended to reach combinations and conspiracies which restrain freedom of action in interstate trade and commerce and unduly suppress or restrict the play of competition in the conduct thereof." * * * "While the law may not be able to enforce competition, it can reach combinations which render competition impracticable."

In *Northern Securities Company against United States* (193 U. S. 197) Mr. Justice Harlan, announcing the affirmance of the decree of the Circuit Court, said:

"In all the prior cases in this Court the Anti-trust Act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Now, can this Court say that such a rule is prohibited by the Constitution or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitution? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and com-

merce is an economic question which this Court need not consider or determine" (p. 337).

Can it be said that Congress in forbidding combinations, in order to secure free competition in interstate commerce, did not go farther afield than civilized commercialism which by imposing the rule of equality upon competition acts directly to free commerce itself? The economic question is for Congress. Shall it decide that the free and *equal* operation of competition is wise and wholesome for trade and commerce, it will have decided for civilized commercialism—a decision the Supreme Court will neither consider nor reverse.

In the interest solely of the common good many similar economic questions, from the legal standpoint, were so long ago decided that their decision is now seldom seen to have been economic. Though some may consider that moral or legal problems were solved when innkeepers were held insurers of the property and goods of travelers entrusted to their care, or common carriers subjected to like liability, such was not the fact. For either to steal was equally immoral and illegal before their civil liability was made more onerous. Stealing was decreased only as it was made less profitable. The problem was not thus solved to decrease stealing but to preserve property. The legal problem was merely to express the economic solution.

The economic question was how best to preserve

from thieves the goods of honest travelers. "The rule of the common law which treated a common carrier as an insurer grew out of a situation which required that kind of security for the protection of the public. To quote the quaint but expressive words of Lord Holt, in *Coggs v. Bernard*, 2 Ld. Raymond, 909, when defending and applying the doctrine of absolute liability against loss not due to the act of God or the public enemy, 'this rule,' said he, 'is a politick establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sort of persons that they may be safe in their ways of dealing' " (Mr. Justice Lurton in *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186, 205). After the adoption of the wise and wholesome rule which held innkeepers and common carriers insurers of all such goods in their possession except against acts of God or the public enemy, the goods were thenceforth safe. Thefts by innkeepers and common carriers at once became as unprofitable as senseless because what they stole they must return—with costs. That there was less stealing was a by-product.

The solution of an economic problem had again helped morality by removing temptation. Progress had been made all along the line because an additional adjustment had been made in a world of order. But doubtless innkeepers and carriers loudly complained both that their liberty to carry on suc-

cessful business had been unduly cut down, and that their property had been taken without due process of law—though the only liberty cut down was the liberty to steal. No property whatever was taken. Merely a new regulation was made. Thereafter innkeepers and common carriers trafficked subject to it. Their liberty was not unduly restrained and their property was not taken because they were not forced to remain in business. They could escape the regulation any time by retiring. While remaining they voluntarily placed themselves and their property under the regulation.

In *Noble State Bank against Haskell*, *supra*, it was unsuccessfully argued by appellant that payments required by a bank guarantee statute assessing without limit all state banks for the benefit of the depositors of any which might fail was taking private property for private use. To this the United States Supreme Court, per Mr. Justice Holmes, replied: "For in this case there is no out and out unconditional taking at all. The payment can be avoided by going out of the banking business, and is required only as a condition for keeping on" (p. 580).

A similar economic question, more recent than that concerning common carriers and innkeepers, arose over grain elevators. Its like solution in the sole interest of the common good is so analogous to the plan we are proposing that it is worthy of

extended examination. The following leading case is ample authority for the constitutionality of civilized commercialism because it goes much farther than civilized commercialism needs to go.

In *Munn against Illinois* (94 U. S. 113) the first paragraph of the headnote reads as follows: "Under the powers inherent in every sovereignty, a government may regulate the conduct of its citizens toward each other, and, when necessary for the public good, the manner in which each shall use his own property."

From the opinion of the court, per Mr. Chief Justice Waite, "it appears that 'the great producing region of the West and North-west sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern ports. * * * The quantity (of grain) received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called elevators, because the grain is elevated from the boat or car, by machinery operated by steam, into the bins prepared for its reception, and elevated from the bins, by a like process, into the vessel or car which is to carry it on. * * * It has been found impossible to pre-

serve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels which are negotiable, and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit.'

"In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such 'as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication.' Thus it is apparent that all the elevating facilities through which these vast productions 'of seven or eight great States of the West'

must pass on the way 'to four or five of the States on the seashore' may be a 'virtual' monopoly" (pp. 130-1). The litigation arose because Illinois in 1871 passed an act fixing the maximum of elevator charges.

Mr. Chief Justice Waite, for the court, further said: "When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.' This does not confer power upon the whole people to control rights which are purely and exclusively private, *Thorpe v. R. & B. Railroad Co.*, 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the *License Cases*, 5 How. 583, 'are nothing more or less than the powers of government inherent in every sovereignty, * * * that is to say * * * the power to govern men and

things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all of these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington 'to regulate * * * the rates of wharfage at private wharves, * * * the sweeping of chimneys, and to fix the rates of fees therefor, * * * and the weight and quality of bread.' 3 Stat. 587, sect. 7; and, in 1848, 'to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers,' 9 id. 224, sect. 2.

"From this it is apparent that, down to the time

of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation.

“This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is ‘affected with a public interest, it ceases to be *juris privati* only.’ This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has

thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

“Thus, as to ferries, Lord Hale says, in his treatise *De Jure Maris*, 1 Harg. Law Tracts, 6, the king has ‘a right of franchise or privilege, that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the king. He may make a ferry for his own use or the use of his family, but not for the common use of all the king’s subjects passing that way; because it doth in consequence tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a public regulation, viz., that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these he is finable.’ So if one owns the soil and landing-places on both banks of a stream, he cannot use them for the purposes of a public ferry, except upon such terms and conditions as the body politic may from time to time impose; and this because the common good requires that all public ways shall be under the control of the public authorities. This privilege or prerogative of the king, who in this connection only represents and gives another name to the body politic, is not primarily for his profit, but

for the protection of the people and the promotion of the general welfare.

“And, again, as to wharves and wharfingers, Lord Hale, in his treatise *De Portibus Maris*, already cited, says:

“ ‘A man, for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for crantage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own. * * * If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the queen, * * * or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for crantage, wharfage, pesage, etc., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king’s license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by a public interest.’

“This statement of the law by Lord Hale was cited

with approbation and acted upon by Lord Kenyon at the beginning of the present century, in *Bolt v. Stennett*, 8 T. R. 606.

“And the same has been held as to warehouses and warehousemen. In *Aldnutt v. Inglis*, 12 East, 527, decided in 1810, it appeared that the London Dock Company had built warehouses in which wines were taken in store at such rates of charge as the company and the owners might agree upon. Afterwards the company obtained authority, under the general warehousing act, to receive wines from importers before the duties upon the importation were paid; and the question was, whether they could charge arbitrary rates for such storage, or must be content with a reasonable compensation. Upon this point Lord Ellenborough said (p. 539):

“ ‘It is enough that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches, as laid down by Lord Hale in the passage referred to (that from *De Portibus Maris* already quoted), which includes the good sense as well as the law of the subject.’

“And in the same case *Le Blanc*, J., said (p. 541):

“ ‘Then, admitting these warehouses to be private property, and that the company might discontinue this application of them, or that they might have made what terms they pleased in the first instance, yet having, as they now have, this monopoly, the

question is, whether the warehouses be not private property clothed with a public right, and, if so, the principle of law attaches upon them. * * * But though this be private property, yet the principle laid down by Lord Hale attaches upon it, that when private property is affected with a public interest it ceases to be *juris privati* only; and, in case of its dedication to such a purpose as this, the owners cannot take arbitrary and excessive duties, but the duties must be reasonable.'

"We have quoted thus largely the words of these eminent expounders of the common law, because, as we think, we find in them the principle which supports the legislation we are examining. Of Lord Hale it was once said by a learned American judge,—

" 'In England, even on rights of prerogative, they scan his words with as much care as if they had been found in Magna Charta; and the meaning once ascertained, they do not trouble themselves to search any further.' 6 Cow. (N. Y.) 536, note" (pp. 124-9).

"Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. *New Jersey Nav. Co. v. Merchants' Bank*, 6 How. 382. Their business is, therefore, 'affected with a public interest,' within the meaning of the doctrine which Lord Hale has so forcibly stated.

"But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public

regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle" (p. 130).

"They stand, to use again the language of their counsel, in the very 'gateway of commerce,' and take toll from all who pass. Their business most certainly 'tends to a common charge, and is become a thing of public interest and use.' Every bushel of grain for its passage 'pays a toll, which is a common charge' and, therefore, according to Lord Hale, every such warehouseman 'ought to be under public regulation, viz., that he * * * take but reasonable toll.' Certainly, if any business can be clothed 'with a public interest, and cease to be *juris privati* only,' this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts" (p. 132).

"Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial

progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

"It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good" (p. 133).

Mr. Justice Field dissented from the opinion of the court and, with strict logic, said: "The public has no greater interest in the use of buildings for the storage of grain than it has in the use of buildings for the residences of families, nor, indeed, anything like so great an interest; and, according to the doctrine announced, the legislature may fix the rent of all tenements used for residences, without reference to the cost of their erection. * * * The public is interested in the manufacture of cotton, woolen, and silken fabrics, in the construction of machinery, in the printing and publication of books and periodicals, and in the making of utensils of every variety, useful and ornamental; indeed, there is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community, in which the public has not an interest in the sense

in which that term is used by the court in its opinion" (pp. 140-1).

The learned dissenting justice doubtless thought he was raising the bugbear of socialism. Instead, he pointed out merely an economic truism. Certainly the public interest is the same. It will be equally exercised when rendered necessary "by the facts." Mr. Justice Field overlooked the fact that land and manufactures were still in his time, unlike grain elevators, in multitudinous ownership. He failed to see that, while the public interest in residences is not increased by land monopoly, the necessity for public intervention to protect that interest is slight until there is some prospect of monopolists. At present, competition among small landowners sufficiently protects it. The public interest in grain elevators was always the same. With virtual monopoly came the duty of the state to intervene.

The public interest in cotton, woolen, steel and other manufactures is now no greater than in 1876, when *Munn against Illinois* was decided by the United States Supreme Court. That interest was then sufficiently protected by competition without regulation. With virtual monopoly the time has now arrived when the same public interest can be sufficiently protected only by the regulations of civilized commercialism. These regulations simply extend the law to meet new developments of commercial progress. "Big business" has been clothed

with an active public interest "by the facts." While regulating "big business" it is also necessary to regulate "little business," or leave the public and "big" at the mercy of "little." Without extending the law as far as *Munn* against Illinois has already extended it, the regulations of civilized commercialism will bring our legal system into line, in necessary respects, with our economic progress.

In *Munn* against Illinois the plaintiffs in error were not corporations but private individuals. They were successfully prosecuted under a penal statute. The doctrine of *Munn* against Illinois has often been reaffirmed and reasserted (*Budd v. New York*, 143 U. S. 517; *Brass v. Stoesser*, 153 U. S. 391; *Cargill Company v. Minnesota*, 180 U. S. 452; the latter case dealt with a Minnesota statute under which (Laws 1895, ch. 148) the elevator owner was required to receive grain "without discrimination" from any person delivering the same. In case of dispute as to grade, there was provision for arbitration by the "chief inspector of grain at St. Paul").

The individuals in the *Munn* case exercised no eminent domain and possessed no franchise. Mr. Justice Field thought Lord Hale's authority would only have applied had they "dedicated" their elevators to the public. He failed to note that there are two kinds of dedication—express and implied. The plaintiffs in error had not expressly dedicated anything to the public but by allowing their ele-

vators to become so important to the public interest, they had been impliedly dedicated "by the facts." Only a well-known rule of law, in essence, was applied. One likewise impliedly grants a right of way by the fact of necessity, under a well-settled rule, when he sells land entirely surrounded by his own to a purchaser who would take no profit from his purchase were no such right of way implied.

All men, as brothers and partners in an equal compact, can acquire only as trustees for the common good whatever in single hands would embarrass the copartnership. This beneficent rule of partnership law has always been applied by courts of equity to contracts of copartnership. It has equal application to the social compact. The plaintiffs in error in acquiring a virtual monopoly of elevators were necessarily held, under partnership law as under the Golden Rule, to have done so for the equal benefit of their brothers. Otherwise human justice would be in the anomalous, if not ridiculous, position of enforcing lesser contracts but not the compact which gives all others their basis of enforcement; of enforcing lesser rules but not the Golden Rule which all admit the greatest.

It will be observed that, after the true Sherman law method, the corrective of Munn against Illinois was applied twenty years after the evil had arisen. But the body politic is not limited to remedies which cure, or attempt to cure, after disease has wasted.

It can with equal if not greater right apply remedies which will prevent unfair monopoly from arising. It is not the fact that monopoly has risen that gives the state the right to strike it down. That right arises because present monopoly infringes the common good. To prevent an evil from arising which will infringe the common good is equally within the right to regulate inherent in every state. To secure present justice and avoid future evil will therefore doubly justify the state in adopting civilized commercialism. Many virtual monopolies now need to be struck down. Industries soon to become such under present conditions will be prevented by the rule of justice from further inflicting their fast-growing evil. Justice will also be secured to all by all—even by those who, while inflicting evil, would never inflict the greater evil of monopoly.

While the states under the police power have ample authority to enact civilized commercialism, the authority of Congress under the interstate commerce clause is equally ample. Regulation should be by all. A national disease deserves and requires a national remedy. The new note of liberty long waiting to be struck, which all the land has been long listening to hear, should come first from the central harp and dominate the entire orchestra. This nation will then move up the heights of prosperity, peace and justice to summits never before attained by man.

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